Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

MORTON BERGER,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Morton Berger is serving a 200-year prison sentence for possessing twenty images of child pornography, each image charged in a separate count. Arizona law mandates a prison sentence of 10 to 24 years for each image of child pornography possessed, and requires each sentence to run consecutively to every other sentence, with no possible probation, early release, or parole. The trial court did not conduct a proportionality inquiry to determine if this sentence was grossly disproportionate for a 52-year-old professional with no criminal history. A majority of the Arizona Supreme Court refused to consider the whole of Petitioner's 200-year sentence under Arizona's mandatory flat, consecutive sentencing scheme, as a factor in whether Petitioner's punishment violates the Eighth Amendment.

I.

Whether the Eighth Amendment forbids courts from considering the fact of a mandatory flat, consecutive sentencing scheme for multiple counts, rather than merely focusing on the sentence for a single count, when determining whether an entire sentence constitutes an excessive or cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

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Petitioner Morton Berger respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Arizona Supreme Court entered on May 10, 2006.

OPINIONS BELOW

The Arizona Supreme Court *en banc* opinion (App. A 1a-41a), is reported as *State v. Morton Berger*, 212 Ariz. 473, 134 P.3d 378 (filed May 10, 2006) (Hurwitz, J., concurring), (Berch, V.C.J., concurring in part and dissenting in part). No request for rehearing was filed. The Arizona Court of Appeals, Division One opinion (App. B 42a-85a), is reported as *State v. Morton Berger*, 209 Ariz. 386, 103 P.3d 298 (Ct. App. 2004) (Kessler, J., concurring in part and dissenting in part).

STATEMENT OF JURISDICTION

The Arizona Supreme Court's judgment was entered on May 10, 2006. On July 21, 2006 Justice Kennedy extended the time for filing this petition for certiorari to and including September 7, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioner asserted below, and asserts here, that he has been deprived of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment to the Constitution of the United States provides, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

Arizona Revised Statute § 13-3553 " Sexual exploitation of a minor," provides in pertinent part:

> A. A person commits sexual exploitation of a minor by knowingly:
>
> > 1. Recording, filming, photographing, developing or duplicating any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.
> >
> > 2. Distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.
>
> * * *

> C. Sexual exploitation of a minor is a class 2 felony and if the minor is under fifteen years of age it is punishable pursuant to section 13-604.01.

Ariz. Rev. Stat. Ann. § 13-3553.

STATEMENT OF THE CASE AND FACTS

I. The Facts

In June 2002, Phoenix police officers found thousands of images of pornography, including some child pornography, in Petitioner Morton Berger's home. Berger had accumulated his collection over six years. App. A 13a.

Berger was initially indicted for thirty-five counts of sexual exploitation of a minor, charged as one count for each image, pursuant to Ariz. Rev. Stat. Ann. § 13-3553. Each count is a separate felony punishable by a mandatory sentence of ten to twenty-four years prison, with a presumptive term of seventeen years, without any possible probation, early release, or parole, and the sentence for each count must be served consecutively. *Id.* § 13-3553(C). *See also Id.* § 13-604.01 (D), (G), (K). *See generally*, App. C 86a. Berger faced a mandatory minimum sentence of 350 years in prison without any possibility of release.

Berger first raised his Eighth Amendment challenge to Ariz. Rev. Stat. Ann. § 13-3553, and the "dangerous crimes against children" sentencing law in a pretrial motion. App. B 44a. He argued that under *Solem v. Helm*, 463 U.S. 277 (1983), the mandatory sentence was grossly disproportionate as applied to him, a 52-year-old first-time offender, father, and award-winning teacher, and constituted

cruel and unusual punishment under the Eighth Amendment. App. B 44a. Prior to trial, the prosecutor offered Berger a plea with a minimum possible prison sentence of seventeen years without parole; the prosecutor dismissed a risk assessment conducted by a clinical and forensic psychologist that concluded Berger "posed no risk of repeating his conduct or of acting out toward children." App. B 75a.[1]

At trial, the prosecution dismissed fifteen counts of the indictment and Berger was convicted of the remaining twenty counts. Other than the twenty images he was convicted of possessing, there is no evidence of how many actual child pornography images (as opposed to adult pornography) he possessed. App. B 74a.

Berger was never accused, charged, or convicted of any other crime. No evidence was presented at trial that Berger made, distributed, or purchased the images, or had any improper contact with a child. Without holding a proportionality hearing, and against the prosecutor's request for a 340 year sentence, the trial judge sentenced Berger to the mandatory minimum mitigated sentence: a 200-year prison term.

II. The Appellate Proceedings

Berger appealed his sentence to the Arizona Court of Appeals. He again argued that his 200-year punishment was

1. In another Arizona child pornography possession case, the same prosecutor offered a police officer accused of possessing seventeen child pornography images a six-year sentence, which he accepted. *See State v. Shropshire*, Maricopa County case number CR2001-018097; www.courtminutes.maricopa.gov/docs/Criminal/072002/m0712802.pdf.

grossly disproportionate to his crime as compared to sentences for violent Arizona crimes (referring to the intra-jurisdictional test in *Solem v. Helm*, 463 U.S. 277, 292 (1983)), and to sentences for the same crime in other states (*Solem's* inter-jurisdictional test). App. B 42- 43a. Berger provided the court with a survey of child pornography sentencing laws of all fifty states. The survey shows that Berger's mandatory minimum sentence "exceeds that imposable in any other state," App. A 32a; and that "Arizona has the highest possible sentencing range in the entire United States. . . ." App. B 82a.

A divided panel of the appellate court rejected Berger's arguments under both the state and federal Constitutions.[2] App. B 63a. The majority stated, "we usually do not consider the imposition of consecutive sentences when determining proportionality." App. B 59a. In an exhaustive dissent, Presiding Judge Kessler disagreed with the majority's refusal to consider Berger's sentence as a whole, "it is *exactly* the combination of minimum mandatory sentences and mandatory consecutive sentencing which can create the inference of gross disproportionality." (Emphasis in original). App. B 78a. Following this decision, Berger petitioned the Arizona Supreme Court for review.

A majority of the Arizona Supreme Court rejected Berger's argument that a reviewing court must consider the cumulative nature of his 200-year sentence to determine if

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2. "In *State v. Davis*, 206 Ariz, 377, 380-81, 79 P.3d 64, 67-68 (2003) (cite omitted), the Arizona Supreme Court considered whether Arizona's constitutional prohibition against cruel and unusual punishment provided greater protection than its federal counterpart, but it found no compelling reason to so find and neither do we." App. B 44a nt.2.

his punishment is grossly disproportionate to his crime of possessing twenty child pornography images. App. A 24a. Instead, the court re-framed the issue, limiting its analysis to a sentence for one count, ("we focus on whether a ten-year sentence is disproportionate for a conviction of possessing child pornography involving children younger than fifteen."). App. A 13a. The court refused to consider Berger's sentence as a whole, ("'Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.'") (quoting *United States v. Aiello,* 864 F.2d 257, 265 (2d Cir. 1988)). App. A 14a.

The court dismissed further consideration of Berger's mandatory cumulative sentence by relying on footnote one in *Lockyer v. Andrade*, 538 U.S. 63 (2003). "This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences." App. A 14a. The court then held Berger's 200-year punishment constitutional by considering only one count of his total sentence. "Given the principles established by prior decisions, we cannot conclude that a ten-year sentence is grossly disproportionate to Berger's crime of knowingly possessing child pornography. . . ." App. A 14a.

Justice Hurwitz, in a separate concurring opinion, stated "there is much to commend Justice Berch's suggestion that the cumulative sentence imposed upon Mr. Berger was unnecessarily harsh, and my personal inclination would be to reach such a conclusion." App. A 25a. Justice Hurwitz further commented that he "reluctantly" agreed with the majority's conclusion that this Court's precedents in *Harmelin v. Michigan*, 501 U.S. 957 (1991), and *Lockyer*, prohibit lower courts from considering the offender's particular situation or the mandatory consecutive nature of a

sentence when deciding if a sentence is grossly disproportionate. App. A 28a. While upholding Berger's sentence, Justice Hurwitz concluded, "I therefore find merit in Justice Berch's suggestion that objective analysis would be easier if courts were allowed to conduct an intra- and inter-jurisdictional analysis at the outset in order to find an inference of gross disproportionality." App. A 26a.

Justice Berch, dissenting from the majority, wrote, the question "is how to determine whether the sentence at issue is grossly disproportionate." App. A 30a. Her dissent then challenged the majority's interpretation of *Lockyer* to Berger's case:

> But in determining whether a total sentence is grossly disproportionate to the crime for which it was meted out as punishment, we must deal with the sentence imposed as a whole and not shield ourselves from the full impact of the sentence by analyzing only one charge and sentence.

App. A 36-37a.

By compounding "extraordinarily long" prison terms with mandatory stacked counts that must be served consecutively and without any possible release, this "triple whammy" impact, the dissent argued, should not escape scrutiny from a court asked to determine if a punishment violates the Eighth Amendment. App. A 37a. Justice Berch concluded that if the majority had considered Berger's entire sentence using *Solem's* intra- and inter-jurisdictional

comparison, it would find an inference of gross disproportionality in his punishment:

> My point in this opinion is merely to demonstrate that were we able to conduct such an objective inquiry as a part of our determination of whether a sentence gives rise to an inference of gross disproportionality, the analysis would demonstrate that Arizona's sentence for this crime is by far the longest in the nation and is more severe than sentences imposed in Arizona for arguably more serious and violent crimes. Such objective facts support finding an inference of gross disproportionality.

App. A 31a.

REASONS FOR GRANTING THE PETITION

The Arizona Supreme Court wrongly interpreted this Court's precedents by refusing to consider the full impact of Arizona's mandatory flat, consecutive sentencing scheme. The court majority misapplied *Lockyer* to the facts of this case and concluded it could not consider Berger's cumulative punishment. Berger's flat, consecutive, probation and parole ineligible sentence is required by Arizona's "dangerous crimes against children" sentencing scheme. Ariz. Rev. Stat. Ann. § 13-604.01 (D)(G)(K)(L)(2002). App. C 87a, 89a, 91a.

This is a case of first impression. This Court has yet to decide if combining statutorily mandated long prison sentences, for multiple counts of the same offense, that must be served consecutively with no early release possible for

first offenders, can result in a total punishment grossly disproportionate to the seriousness of the crime. If Petitioner's 200-year punishment for possessing twenty contraband images escapes scrutiny, then "it is difficult to envision when a court would ever find a term of years to be disproportionate to the gravity of the crime and the harm to the public." App. A 40-41a.

This Court should grant this Petition and declare Berger's punishment unconstitutional, or instruct the Arizona Supreme Court to examine Berger's punishment as a whole to determine whether, measuring the gravity of his conduct against sentences imposed in Arizona for violent offenses, and sentences imposed in every other jurisdiction for this crime, a 200-year, no release prison sentence is grossly disproportionate to the crime of possessing twenty child pornography images.

ARGUMENT

I. THE ARIZONA SUPREME COURT'S REFUSAL TO CONSIDER PETITIONER'S 200-YEAR SENTENCE AS A WHOLE, INSTEAD TREATING HIS EIGHTH AMENDMENT CHALLENGE AS APPLYING TO ONLY ONE 10-YEAR SENTENCE FOR POSSESSING ONE CHILD PORNOGRAPHY IMAGE, INCORRECTLY INTERPRETS THIS COURT'S EIGHTH AMENDMENT PRECEDENT AS PRECLUDING COURTS FROM CONSIDERING AN ENTIRE SENTENCE WHEN DETERMINING IF THE PUNISHMENT VIOLATES THE EIGHTH AMENDMENT.

What is just in this sense, then, is what is proportional, and what is unjust is what violates the proportion.

Aristotle, The Nicomachean Ethics 113 (350 B.C.E.)

The Arizona Supreme Court was wrong to interpret this Court's precedents as forbidding lower courts from considering a mandatory consecutive sentencing scheme that results in a minimum 200-year prison sentence for possessing twenty images of child pornography. Justice Bales, writing for the majority, states that "if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate." App. A 14a. The court concluded that lower courts cannot consider the consecutive nature of a sentence when determining if a total punishment is disproportionate to a crime, relying on a comment this Court made in a footnote in *Lockyer v. Andrade*, 538 U.S. 63, 74 n.1 (2003). Citing *Lockyer* as prohibiting courts from considering the consecutive nature of a sentence in an Eighth Amendment challenge misinterprets *Lockyer*.

Contrary to the Arizona Supreme Court's decision, this Court has not yet decided the constitutionality of a combined mandatory, consecutive, long, no-release sentence like Berger's, in *Lockyer,* or in any other case. In *Lockyer,* this Court was asked to decide whether the California Court of Appeal's rejection of Andrade's Eighth Amendment challenge violated recent amendments to the federal habeas statute. This Court was not directly reviewing Andrade's constitutional Eighth Amendment claim *de novo*, ("we do not reach the question whether the state court erred and instead focus solely on whether § 2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim."). 538 U.S. at 71. After Justice O'Connor conceded that this Court's opinions have "not been a model of clarity" and have "failed to establish a clear or consistent path for courts to follow," the Court concluded that, "it was not an unreasonable

application of our clearly established law for the California Court of Appeal to affirm Andrade's sentence of two consecutive terms of 25 years to life in prison." *Id.* at 77.

The footnote referred to by the Arizona Supreme Court was in response to the *Lockyer* dissent's comparison of Andrade's sentence to other challenged sentences, and merely clarifies this Court's limited role when reviewing a lower court's decision in habeas proceedings. Since the issue before this Court in *Lockyer* was not whether Andrade's two 25-year consecutive sentences were unconstitutional, then the Arizona Supreme Court's reliance on *Lockyer* was misplaced. This Court has not precluded lower courts from considering an entire punishment that results from mandatory consecutive sentences when deciding whether the punishment imposed is cruel and unusual. Thus, the Arizona Supreme Court's refusal to consider the cumulative effect of Arizona's mandatory consecutive sentencing scheme on Berger wrongly applies this Court's precedents.

To the contrary, this Court has held that it is appropriate for courts to review an entire sentence to determine if it is grossly disproportionate to the crime. The Cruel and Unusual Punishments Clause prohibits not only punishments inflicting torture, "but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Weems v. United States*, 217 U.S. 349, 371 (1910).

Berger's cumulative punishment is analogous to a sentence Justice Scalia cited in *Harmelin* as an example of cruel and unusual punishment. *See Harmelin*, 501 U.S. at 985 n.10. In *State ex rel. Garvey v. Whitaker*, defendant's six-year jail sentence for trespassing was found to be cruel and unusual punishment because it reduced a single

continuous act into multiple counts resulting in an excessive aggregate sentence. 48 La. Ann. 527, 19 So. 457 (1896). The city ordinance authorized a sentence of 30 days, but defendant's one-hour and forty-minute trespass was charged as 72 separate counts, "each offence embracing only one and one-half minutes and one offence following after the other immediately and consecutively." *Garvey*, 48 La. Ann. at 533, 19 So. at 459. The Louisiana Supreme Court found the sentence cruel and unusual "considering the offence to have been a continuing one." *Id.*

Just as trespassing is a single continuous act that is temporally divisible into separate counts, possession of contraband can also be divided into separate counts. Just as trespassing for only ninety seconds is not likely to be charged, it is equally unlikely anyone will face charges of possessing only one child pornography image for only one day. If the Louisiana legislature enacted a law making trespassing for one second a chargeable offense requiring flat, consecutive 30-day jail sentences per count, than one hour of trespassing requires a sentence of 295 years. Such an extreme sentence, like Berger's, should not escape scrutiny merely because it is legislatively mandated. If this Court's deference to the primacy of the legislature, is absolute, than the Eighth Amendment provides no limitations on a sentence like *Garvey's*.

Arizona law prohibits concurrent sentences for child pornography possession, yet the Arizona court dismissed as irrelevant to Eighth Amendment analysis, Arizona's consecutive sentencing scheme. The court's analysis essentially treated Berger's consecutive sentence the same as if it were concurrent for twenty total images. To do this, the court had to ignore the nature of this offense, that

possessors of child pornography possess more than one image and for more than one day. Many crimes, such as continuous sexual abuse of a child or mail fraud, have, by definition, multiple separate occurrences yet are either charged as one crime or are eligible for concurrent sentences.[3] As a result of its refusal to decide whether Arizona's consecutive sentencing requirement is unconstitutional, the Arizona Supreme Court did not resolve the question whether Berger's 200-year total sentence, required by Arizona's "dangerous crimes against children" sentencing statute, is unconstitutional as applied to Berger.

A. If the Arizona Supreme Court had correctly interpreted this Court's Eighth Amendment precedents, and considered Petitioner's 200-year punishment as a whole, it would have concluded that Petitioner's punishment violates the Eighth Amendment.

Punishments I know are necessary, and I would provide them, strict and inflexible, but proportioned to the crime.

> Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), in 1 The Papers of Thomas Jefferson, 1760-1776, at 505.

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3. *See* Ariz. Rev. Stat. Ann. § 13-1417, "A person who over a period of three months or more in duration engages in three or more acts in violation of section 13-1405 (sexual intercourse), 13-1406 (sexual assault) or 13-1410 (child molest) with a child under fourteen years of age is guilty of continuous sexual abuse of a child. . . . Continuous sexual abuse of a child is a class 2 felony and is punishable pursuant to section 13-604.01." *See also* 18 U.S.C. § 1341(mail fraud);18 U.S.C.S. Appx. § 2B1.1 (sentence range for mass-marketing).

Arizona's mandatory sentence for possessing child pornography results in a sentence "longer than that imposed in Arizona for many crimes involving serious violence and physical injury to the victim." App. A 34a. Furthermore, Arizona's sentence is "by far the longest in the nation" for this crime. App. A 31a. In most states Berger's crime would have resulted in a sentence of no more than five years, and he would also have the possibility of probation or early release. App. A 34a; *See also* e.g., Cal. Penal Code § 311.11(a) (West, Westlaw through 2006 Sess.) (up to twelve months). As the dissent below noted, "if the Supreme Court's jurisprudence permitted the court to examine the sentences imposed in other jurisdictions for similar crimes – the inter-jurisdictional analysis mentioned in *Solem, Harmelin*, and *Ewing* – the analysis would support the inference that Berger's 200-year sentence is grossly disproportionate." App. A 34a.

Had the Arizona Supreme Court majority considered Petitioner's sentence as a whole, it would have found it grossly disproportionate. *See Solem v. Helm,* 463 U.S. 277 (1983), *Harmelin v. Michigan*, 501 U.S. 957 (1991). In *Solem*, this Court adopted a three-part proportionality test to determine whether a sentence violates the Eighth Amendment by being disproportionate to the crime. 463 U.S. at 292. First, courts compare "the gravity of the offense and the harshness of the penalty;" then compare "sentences [for serious crimes] imposed on other criminals in the same jurisdiction" (intra-jurisdictional analysis); and "sentences imposed for the commission of the same crime in other jurisdictions" (inter-jurisdictional analysis). *Id.* at 290-94.

This Court has since narrowed *Solem's* proportionality analysis and held that courts must first find a "threshold

inference" of gross disproportionality before engaging in *Solem's* inter- and intra- jurisdictional comparison of other sentences. *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

Had the trial court held a proportionality hearing to compare the circumstances of Berger's crime to the gravity of his offense, and to "explore both Berger's risk and potential of contributing to society," the court would have weighed Berger's risk, as assessed by a clinical and forensic psychologist that concluded he poses little or no risk to re-offend, against his punishment, and found Berger's sentence grossly disproportionate. App. B 75a. But that comparison was only done by the dissenting appellate judges below. *See* App. A 37-40a, App. B 75-76a.

The majority decided they could not review Berger's total sentence, they could only analyze one count, ("my colleagues derive the proposition that the court may not consider the consecutive nature of Berger's sentences in determining whether the total is grossly disproportionate to the seriousness of Berger's crimes.") App. A 36a. Had the court considered Berger's total sentence, it would have concluded, as both dissenting judges did, that Berger's sentence raises an inference of gross disproportionality. Had the court applied *Solem's* objective comparisons, it would have found Berger's 200-year sentence unconstitutional.

Using *Solem's* intra-jurisdictional analysis, Berger's sentence far exceeds sentences imposed in Arizona for violent crimes. The sentence for sexually assaulting a child under twelve is the same as for possessing a single image of that assault. Yet sexual assault can be reduced to countless

separate images, and possessing five of those images can result in a life sentence. Meanwhile, the perpetrator of the assault will be released. *See* Ariz. Rev. Stat. Ann. § 13-604.01(D) (2002 Supp.). Possessing two images carries a more severe presumptive sentence (34 years) than second degree murder of a child, or forcible rape of a child under twelve (Ariz. Rev. Stat. Ann. § 13-604.01 (B), (D) (2001)), and is *26 years longer* than forcible rape of an adult (Ariz. Rev. Stat. Ann. § 13-1406(B) (2001) (seven year presumptive for rape)). Arizona's presumptive sentence for four counts of possessing four child pornography images is 68 years flat. A mitigated sentence for possessing five pictures (fifty years) amounts to a life sentence without parole, "more serious than the sentence imposed for virtually any crime in the state." App. A 35a.

Berger's crime, "sexual exploitation of a minor" for possessing child pornography is the only "dangerous crime against children" that does not involve contact with children. App. A 35a. The "absence of direct violence affects the assessment of society's interest in punishing his acts so severely." *Rummel v. Estelle*, 445 U.S. 263, 275 (1980). So it is unreasonable to compare possessing a child pornography picture with second degree murder, rape, or actual sexual assault of a child, although all of these acts receive the same severe punishment. But unlike murder and rape, a sentence for possessing one child pornography picture cannot be reduced or paroled. *See* Ariz. Rev. Stat. Ann. § 13-604.01(G)(K)(L); App. C 89a, 91a.

The next stage of the *Solem* test is the *inter*-jurisdictional analysis, a review of other state's sentences for the same crime. The dissenting Arizona Supreme Court justice and the dissenting Court of Appeals judge both agreed that Berger

would have received a considerably shorter sentence in every other state. App. A 32-34a; App. B 82-84a.

When federal law is included in the inter-jurisdictional analysis, it shows that Berger's federal sentence would have been nearly *195 years less* than the mandatory minimum required under Arizona law. *See* U.S. Sentencing Guidelines ("Guidelines") (18 U.S.C.S. Appx. § 5A; § 2G2.2 (Supp. 2005) & § 5A (1996)). Two of the *Berger* court justices noted that the Guidelines recommend a sentence of approximately five years (57-71 months) based on the number and type of images Berger possessed. App. A 27a, 31a. The Guidelines structure its sentencing recommendation based on the total number of pictures possessed (e.g., "at least 10 images, but fewer than 150"), regardless of how long they were possessed. Had Berger been charged in federal court instead of Arizona state court, his sentence would have been based on the total amount found in his possession, not a separate sentence for each image possessed. *See* U.S.S.G. § 3D1.2 (Nov. 2002) ("All counts involving substantially the same harm shall be grouped together into a single Group.").

To justify Berger's 200-year sentence, the majority compared it to sentences for committing twenty murders or twenty rapes. The court ignores the monumental differences in terms of direct damage to society, the victims, and the moral culpability of the offender, between committing twenty murders or twenty rapes and possessing twenty pictures. "Nonviolent crimes are less serious than crimes marked by violence or the threat of violence." *Solem*, 463 U.S. at 292-293.

The majority then considered one mitigated count in isolation while ignoring the mandatory consecutive

requirement and the likelihood that only one count would be charged. Petitioner could not find any case in which a defendant was charged with possessing a single image of child pornography. The State has never argued that such a case exists. As the dissent noted, "those who possess pornography tend to possess more than one image." App. A 39a.

The Arizona Supreme Court majority analyzes each separate count as if it were a separate prior felony *conviction* to justify Berger's lengthy sentence, just as prior convictions justified extraordinarily long sentences in *Rummel*, *Lockyer*, and *Ewing*. However, each count is obviously not a separate prior conviction. Berger's possession occurred simultaneously; he had no opportunity to reform. Recidivists Ewing and Andrade whose multiple felony convictions finally resulted in life without parole sentences, had multiple opportunities to rehabilitate and return to society as productive citizens after their first, second, or subsequent convictions. (Ewing had four prior felony convictions, including residential burglary and armed robbery, and was sentenced to 25 years to life for stealing golf clubs under California's "three strikes" statute, *Ewing v. California*, 538 U.S. 11 (2003); Andrade had prior theft convictions and was also sentenced under California's "three strikes" law to two consecutive terms of twenty-five years to life. *Lockyer v. Andrade*, 538 U.S. 63 (2003)). Berger never had the opportunity to rehabilitate. And unlike Ewing, Andrade, Solem, and Harmelin, Berger had otherwise been a contributing member of society.

Courts are confused about how to apply *Solem* and *Harmelin* to determine if a sentence is unconstitutional.[4] But Arizona's "dangerous crimes against children" sentencing statute should not survive either analysis. Whether the court initially conducts a *Solem* intra- and inter-jurisdiction review, or whether it first looks for the *Harmelin* inference of gross disproportionality, the statute is unconstitutional. If this Court reviews Berger's entire punishment, instead of examining the sentence for a single count, it would find Berger's punishment excessive, cruel, unusual, and unconstitutional.

When Hammurabi, King of Babylon, said in 1792-1750 B.C.E., "*Ye have heard that it hath been said, An eye for an eye, and a tooth for a tooth,*" he described the proportionality guarantee preserved in the Eighth Amendment. "Even Hammurabi limited the penalty for an eye to an eye." *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004) (Kleinfeld, J., dissenting).

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4. It may be somewhat unclear, in light of the Supreme Court's decision in *Harmelin*, whether *Solem's* three-part proportionality test is still relevant in noncapital cases. *See United States v. Johnson*, 944 F.2d 396, 408 (8th Cir. 1991) ("The effect of *Harmelin* on the *Solem* proportionality factors is not entirely clear."); *United States v. Angulo-Lopez*, 7 F.3d 1506, 1509 (10th Cir. 1993) ("*Harmelin* provides no guidance in articulating the proper approach for an Eighth Amendment review.").

United States v. Kratsas, 45 F.3d 63, 67 (4th Cir. 1995).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF ARIZONA FOR THE STATE OF ARIZONA FILED MAY 10, 2006

SUPREME COURT OF ARIZONA

No. CR-05-0101-PR

STATE OF ARIZONA,

Appellee,

v.

MORTON ROBERT BERGER,

Appellant.

May 10, 2006, Filed

OPINION: ***En Banc***

BALES, Justice

Based on his possession of child pornography, Morton Robert Berger was convicted of twenty separate counts of sexual exploitation of a minor under the age of fifteen and sentenced to twenty consecutive ten-year prison terms. We hold that these sentences do not violate the *Eighth Amendment's* prohibition on cruel and unusual punishment.

Appendix A

I.

Arizona severely punishes the distribution or possession of child pornography. Under Arizona law, a person commits sexual exploitation of a minor, a class two felony, by knowingly "[d]istributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct." Ariz. Rev. Stat. ("A.R.S.") § 13-3553(A)(2) (2002). A "visual depiction," for purposes of this statute, "includes each visual image that is contained in an undeveloped film, videotape or photograph or data stored in any form and that is capable of conversion into a visual image." A.R.S. § 13-3551(10). If a depiction involves a minor under the age of fifteen, the offense is characterized as a dangerous crime against children. A.R.S. § 13-3553(C).

Under this statutory scheme, the possession of each image of child pornography is a separate offense. A.R.S. §§ 13-3551(10), -3553(A)(2); *see also State v. Taylor*, 160 Ariz. 415, 420, 773 P.2d 974, 979 (1989) (affirming fifty consecutive sentences for possession of fifty contraband images obtained over time). Consecutive sentences must be imposed for each conviction involving children under fifteen, and each such sentence carries a minimum term of ten years, a presumptive term of seventeen years, and a maximum term of twenty-four years. A.R.S. § 13-604.01(D), (F), (G), (K). Such sentences must be served without the possibility of probation, early release, or pardon. A.R.S. § 13-3553(C) (prescribing sentencing under § 13-604.01).

Appendix A

A grand jury indicted Berger on thirty-five separate counts of sexual exploitation of a minor based on his possession of printed photographs, computer photo files, and computer video files depicting children in sexual acts. On the State's motion, the trial court dismissed fifteen counts, and trial proceeded on the twenty remaining counts.

The trial evidence established that Berger possessed numerous videos and photo images of children, some younger than ten years old, being subjected to sexual acts with adults and other children, including images of sexual intercourse and bestiality. The jury also heard testimony indicating that, from 1996 to 2002, Berger had downloaded computer files containing child pornography; he had identified several "favorite" websites with titles indicating they provided child pornography; he had recently viewed contraband material; and he had created both computer and hard copy filing systems to maintain his collection. The jury convicted Berger of twenty counts of sexual exploitation of a minor and found that each depiction involved a child under the age of fifteen.

The trial judge sentenced Berger to a ten-year sentence - the minimum mitigated sentence allowed - for each of his crimes and, as required by statute, ordered the sentences to be served consecutively. A.R.S. §§ 13-604.01, -3553(C). The court rejected Berger's argument that his sentences violated the *Eighth Amendment's* prohibition on cruel and unusual punishment. Berger appealed, and a divided panel of the court of appeals affirmed his convictions and sentences. *State v. Berger*, 209 Ariz. 386, 103 P.3d 298 (App. 2004). He petitioned for review, arguing that the rulings below

conflict with this court's opinion in *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003).

We granted Berger's petition to again consider the framework for reviewing *Eighth Amendment* challenges to lengthy prison sentences. We have jurisdiction pursuant to Article 6, Section 5(3), of the Arizona Constitution and A.R.S. section 12-120.24 (2003).

II.

The *Eighth Amendment* to the United States Constitution bars the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. This provision "guarantees individuals the right not to be subjected to excessive sanctions." *Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). "The right flows from the basic precept of justice that punishment for crime should be graduated and proportioned to the offense." *Id.* (internal quotation marks and citation omitted).

The Supreme Court has long recognized that the *Eighth Amendment* limits permissible sanctions in various contexts. For example, the Court has held that the death penalty cannot be imposed for the rape of an adult woman, on mentally retarded defendants, or on those who commit their crimes as juveniles. *See id.* at 568-69 (collecting cases). Likewise, the Court has held that a sentence to "12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive." *Atkins v. Virginia*, 536 U.S. 304, 311, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (citing *Weems v. United*

States, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910)). The Court has also observed that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

Although "the *Eighth Amendment* has been applied to lengthy sentences of incarceration," *Davis*, 206 Ariz. at 381, P13, 79 P.3d at 68 (citation omitted), courts are extremely circumspect in their *Eighth Amendment* review of prison terms. The Supreme Court has noted that noncapital sentences are subject only to a "narrow proportionality principle" that prohibits sentences that are "grossly disproportionate" to the crime. *Ewing v. California*, 538 U.S. 11, 20, 23, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (O'Connor, J., concurring in the judgment) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

This court reviews *Eighth Amendment* challenges to the length of prison sentences under the framework outlined by Justice Kennedy in his concurring opinion in *Harmelin* and later employed by Justice O'Connor in announcing the judgment of the Court in *Ewing*. *Davis*, 206 Ariz. at 383, P30, 79 P.3d at 70.[1]

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1. The Supreme Court's *Eighth Amendment* proportionality decisions "have not established a clear or consistent path for courts to follow." *Lockyer v. Andrade*, 538 U.S. 63, 72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). In rejecting challenges to prison sentences in *Harmelin* and *Ewing*, a majority of the Court did not agree in any

(Cont'd)

Under this analysis, a court first determines if there is a threshold showing of gross disproportionality by comparing "the gravity of the offense [and] the harshness of the penalty." *Ewing*, 538 U.S. at 28; accord *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment) (same). If this comparison leads to an inference of gross disproportionality, the court then tests that inference by considering the sentences the state imposes on other crimes and the sentences other states impose for the same crime. *Ewing*, 538 U.S. at 23-24; *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring in part and concurring in the judgment).

In comparing the gravity of the offense to the harshness of the penalty, courts must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences. The threshold inquiry is guided by several principles that include the primacy of the legislature in determining sentencing, the variety of legitimate penological schemes, the nature of the federal system, and

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(Cont'd)

one opinion. In each case, two justices concluded that prison sentences cannot be challenged on proportionality grounds under the *Eighth Amendment* and stated they would overrule contrary precedent. *Ewing*, 538 U.S. at 31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring); *Harmelin*, 501 U.S. at 994 (Scalia, J., joined by Rehnquist, C.J., concurring). Justice Kennedy's opinion in *Harmelin* and Justice O'Connor's opinion in *Ewing* are the controlling opinions in those cases because they reflect the views of the justices concurring in the judgments on the narrowest grounds. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

the requirement that objective factors guide proportionality review. *Ewing*, 538 U.S. at 23 (citing *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in the judgment)). These principles inform the broader notion that the *Eighth Amendment* "does not require strict proportionality between crime and sentence" but instead forbids only extreme sentences that are "grossly disproportionate to the crime." *Id.* at 23 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment)) (internal quotation omitted).

In *Ewing*, the Court rejected an *Eighth Amendment* challenge to a prison term of twenty-five years to life under California's "three strikes law" for a recidivist offender convicted of stealing three golf clubs worth nearly $1200. Justice O'Connor's plurality opinion first considered the three strikes law in its general application. While recognizing that the law had been criticized for its lack of wisdom and lack of effectiveness, she noted that the State of California had a "reasonable basis" for believing the law would substantially advance the goals of incapacitating repeat offenders and deterring crime. *Id.* at 24-28. Against this backdrop, Justice O'Connor considered and rejected Ewing's argument that his sentence was unconstitutionally disproportionate. Acknowledging that his sentence was long, she concluded that "it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." *Id.* at 30.

Similarly, in *Harmelin*, the Court rejected an *Eighth Amendment* challenge to a mandatory sentence of life imprisonment without parole for a first-time offender convicted of possessing 672 grams of cocaine. 501 U.S. at 994-95. In his plurality opinion, Justice Kennedy noted "that the Michigan legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine — in terms of violence, crime, and social displacement — is momentous enough to warrant the deterrence and retribution of a life sentence without parole." *Id.* at 1003-04 (noting Michigan legislature had a "rational basis" for determining to impose mandatory life sentence).

Recognizing that the penalty imposed on Harmelin was "severe and unforgiving" and that the deterrent effect of Michigan's law was still uncertain, Justice Kennedy nonetheless concluded that "we cannot say the law before us has no chance of success and is on that account so disproportionate as to be cruel and unusual punishment." *Id.* at 1008. Because there was no threshold showing of gross disproportionality, it was unnecessary to compare the sentence with others in Michigan or in other states. *Id.* at 1005.

Harmelin and *Ewing* reaffirm that only in "exceedingly rare" cases will a sentence to a term of years violate the *Eighth Amendment's* prohibition on cruel and unusual punishment. *Ewing*, 538 U.S. at 22 (citation omitted). A court must first determine whether the legislature "has a reasonable basis for believing that [a sentencing scheme] 'advance[s] the goals

of [its] criminal justice system in any substantial way.' " *Id.* at 28 (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983)) (second and third alteration in original). In light of that conclusion, the court then considers if the sentence of the particular defendant is grossly disproportionate to the crime he committed. *Id.* A prison sentence is not grossly disproportionate, and a court need not proceed beyond the threshold inquiry, if it arguably furthers the State's penological goals and thus reflects "a rational legislative judgment, entitled to deference." *Id.* at 30. This framework guides our review of Berger's *Eighth Amendment* challenge to his sentence.

III.

States may criminalize the possession of child pornography to advance the compelling interest of protecting children from sexual exploitation. As the Supreme Court has recognized:

> It is evident beyond the need for elaboration that a State's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." . . . The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.

Osborne v. Ohio, 495 U.S. 103, 109, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 756-58, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) (citations

omitted)) (affirming Ohio's criminal ban on possession of child pornography). Child pornography not only harms children in its production, but also "causes the child victims continuing harm by haunting the children in years to come." *Id.* at 111 (citation omitted); *see also United States v. Sherman*, 268 F.3d 539, 547 (7th Cir. 2001) ("The possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters.").

Criminalizing the possession of child pornography is tied directly to state efforts to deter its production and distribution. Given that the distribution and production of this material occurs "underground," the legislature must be permitted to "stamp out this vice at all levels in the distribution chain." *Osborne*, 495 U.S. at 110. Moreover, criminalization encourages the destruction of such materials. *Id.* at 111. The goal of combating the sexual abuse and exploitation inherent in child pornography animates Arizona's severe penalities for the possession of such material.[2]

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2. The importance of the state's interest justifies prohibiting the mere possession of child pornography, even though the Supreme Court held in *Stanley v. Georgia*, 394 U.S. 557, 565-66, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969), that the *First* and *Fourteenth Amendments* prevent states from criminalizing the in-home possession of adult obscenity. The Court in *Osborne* noted that child pornography has "de minimis" *First Amendment* value and "the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*." 495 U.S. at 108.

Appendix A

In 1978, the Arizona legislature determined that existing state laws were inadequate and enacted legislation specifically aimed at the child pornography industry. The new law, the predecessor to A.R.S. sections 13-3551 to -3553, declared its purposes to include protecting children from sexual exploitation and to "prevent any person from benefiting financially or otherwise from the sexual exploitation of children." 1978 Ariz. Sess. Laws, ch. 200, § 2(B)(1), (3). The legislature specifically identified a series of harms to child victims, including the use of the material by defendants in luring new victims and the fact that such materials cause continuing harm to the children depicted. *Id.* § 2(A)(5)-(6).

In 1983, lawmakers extended this criminal ban to include possession itself, an *amendment* that prosecutors claimed would aid in prosecuting child molesters. 1983 Ariz. Sess. Laws, ch. 93; Hearing on H.B. 2127 Before the H. Comm. on Judiciary, 36th Legis., 1st Reg. Sess. 2 (Ariz. 1983) (comments of Elizabeth Peasley, Pima County Attorney's Office). Such legislation also recognizes the fact that producers of child pornography exist due to the demand for such materials. "The consumers of child pornography therefore victimize the children depicted . . . by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects." *United States v. Norris*, 159 F.3d 926, 930 (5th Cir. 1998) (applying federal sentencing guidelines).

Correspondingly, the legislature soon thereafter included the possession of child pornography among crimes targeted in § 13-604.01 for enhanced sentencing as "dangerous crimes against children." 1985 Ariz. Sess. Laws, ch. 364, § 6. This

legislation provides "lengthy periods of incarceration . . . intended to punish and deter" "those predators who pose a direct and continuing threat to the children of Arizona." *State v. Williams*, 175 Ariz. 98, 102, 854 P.2d 131, 135 (1993) (reviewing the legislative history of § 13-604.01).

Given this history, we conclude that the legislature had a "reasonable basis for believing" that mandatory and lengthy prison sentences for the possession of child pornography would "advance [] the goals of [Arizona's] criminal justice system in [a] substantial way." *Ewing*, 538 U.S. at 28 (internal citation omitted).

IV.

It is "[a]gainst this backdrop," *id.*, 538 U.S. at 28, that we consider Berger's claim that his sentences are grossly disproportionate to his offenses. Berger, as did Ewing, incorrectly frames the issue at the threshold. Ewing argued that his three strikes sentence of twenty-five years to life was based on his "shoplifting three golf clubs"; the Supreme Court noted that in fact Ewing had been sentenced for felony grand theft of nearly $1200 after having already been convicted of at least two violent or serious felonies. *Id.*

Berger contends that he has received a "200 year flat-time sentence . . . upon his conviction of possession of child pornography. . . ." But Berger in fact was convicted of twenty separate counts of possession of child pornography involving minors under fifteen, and he was sentenced to a ten-year term for each count. Each ten-year sentence must, by statute, be served consecutively. A.R.S. § 13-604.01(K).

Berger has not argued that the State's charging him in twenty separate counts was improper. Nor could he, as each count was based on a different video or photo image, the images involved some fifteen different child victims, and Berger had accumulated the images over a six-year period. *Cf. Taylor*, 160 Ariz. at 420, 773 P.2d at 979 (declining to decide if individual could be prosecuted or sentenced on separate counts for multiple images acquired simultaneously). Nor does Berger dispute that possession of child pornography is a serious crime punishable as a felony under federal law and most state laws. *Cf. Ewing*, 538 U.S. at 28 (noting theft of $1200 is a felony under federal and most state laws). For purposes of our analysis, Berger committed twenty separate, and very serious, felonies.

In comparing the gravity of Berger's crime and the severity of the punishment, we focus on whether a ten-year sentence is disproportionate for a conviction of possessing child pornography involving children younger than fifteen. "A defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts." *State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990). Accordingly, as a general rule, this court "will not consider the imposition of consecutive sentences in a proportionality inquiry. . . ." *Davis*, 206 Ariz. at 387, P47, 79 P.3d at 74.[3]

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3. The court in *Davis* concluded that a departure from the general rule was appropriate in light of the specific facts and circumstances of that case. 206 Ariz. at 387, P47, 79 P.3d at 74. The general rule, rather than the exception recognized in *Davis*, applies here, for reasons explained *infra*.

"*Eighth amendment* analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988). Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate. *See Jonas*, 164 Ariz. at 249, 792 P.2d at 712. This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences. *See, e.g., Lockyer*, 538 U.S. at 74 n.1 (rejecting, in context of federal habeas review, dissent's argument that two consecutive sentences of twenty-five years to life for separate offenses were equivalent, for purposes of *Eighth Amendment* analysis, to one sentence of life without parole for thirty-seven-year-old defendant); *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004); *Taylor*, 160 Ariz. at 422, 773 P.2d at 981.

Given the principles established by prior decisions, we cannot conclude that a ten-year sentence is grossly disproportionate to Berger's crime of knowingly possessing child pornography depicting children younger than fifteen. *Cf. Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring in part and concurring in the judgment) (noting severity of Harmelin's drug possession crime brought life sentence "within the constitutional boundaries established by our prior decisions").

Appendix A

The Supreme Court has affirmed a sentence of twenty-five years to life for the grand theft of three golf clubs worth nearly $1200 by a recidivist felon, *Ewing*, 538 U.S. at 30-32; upheld a sentence of life in prison without parole for a first-time offender possessing 672 grams of cocaine, *Harmelin*, 501 U.S. at 996; and found no *Eighth Amendment* violation in two consecutive twenty-year prison terms for possession of nine ounces of marijuana with intent to distribute, *Hutto v. Davis*, 454 U.S. 370, 374, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982) (per curiam). Similarly, this court has upheld a sentence of twenty-five years without parole for a twenty-one-year-old defendant convicted of selling a $1 marijuana cigarette to a fourteen-year-old, even though this sentence was consecutive to a twenty-one-year sentence for the defendant's trafficking in stolen property with the same juvenile. *Jonas*, 164 Ariz. at 249, 702 P.2d at 712.

In fact, only once in the past quarter-century has the Supreme Court sustained an *Eighth Amendment* challenge to the length of a prison sentence. In that case, *Solem v. Helm*, a judge sentenced a non-violent repeat offender to life imprisonment without parole for the crime of writing a "no account" check for $100. 463 U.S. at 279-82. In concluding that this life sentence, "the most severe punishment that the State could have imposed," *id.* at 297, was grossly disproportionate, the Court noted that Solem's crime was quite minor, *Solem*, *id.* at 296. Indeed, the Court stated that the crime of uttering a no account check was "one of the most passive felonies a person could commit." *Id.* (internal quotation omitted).

Solem also did not involve a mandatory sentence, but instead concerned a judge's discretionary decision to impose the maximum authorized sentence. Thus, *Solem* did not implicate the "traditional deference" that courts must afford to legislative policy choices when reviewing statutorily mandated sentences. *See Ewing*, 538 U.S. at 25 (O'Connor, J., announcing judgment of the Court); *Harmelin*, 501 U.S. at 1006-07 (Kennedy, J., concurring in part and concurring in the judgment); *Solem*, 463 U.S. at 299 n.26 (noting that Court's decision "d[id] not question the legislature's judgment").

Berger is in a fundamentally different situation than was the defendant in *Solem*. Berger received a statutorily mandated minimum sentence for each of his separate, serious offenses. The ten-year sentence imposed for each offense is consistent with the State's penological goal of deterring the production and possession of child pornography.

The evidence showed that Berger knowingly gathered, preserved, and collected multiple images of child pornography. When confronted by the police, he acknowledged that he had "downloaded some things that he was not proud of, and was not sure if he should have downloaded them or not." Additionally, in response to police questions, Berger admitted he had downloaded images of people under eighteen and that he believed these people were involved in sexual conduct. He also possessed a news article describing a recent arrest of another person in Arizona for possession of child pornography.

Appendix A

The images for which Berger was convicted, graphically depicting sordid and perverse sexual conduct with pre-pubescent minors, were well within the statutory definition of contraband. Nor did Berger come into possession of these images fleetingly or inadvertently. Berger had obtained at least two images in 1996, some six years before his arrest. The websites Berger flagged as "favorites" included graphic titles indicating that they provide underage, and illegal, pornographic depictions. His computer contained "cookie" files and text fragments indicating he had searched for or visited websites providing contraband material. Berger also had recordable CDs indicating he had specifically set up a "kiddy porn" directory, which included other subfolders with titles indicating a collection of contraband images.

Taken together, this evidence indicates that, in the terminology of *Ewing*, Berger's sentences are "amply supported" by evidence indicating his "long, serious" pursuit of illegal depictions and are "justified by the State's public-safety interest" in deterring the production and possession of child pornography. *Ewing*, 538 U.S. at 29-30.

V.

Berger nonetheless argues that our holding in *Davis* compels the vacating of his sentence. In *Davis*, this court vacated four consecutive thirteen-year sentences imposed on a twenty-year-old man of below average intelligence convicted of having uncoerced sex at different times with two fourteen-year-old girls. 206 Ariz. at 380, PP7-10, 79 P.3d at 68.

Davis represents an "extremely rare case" in which the court concluded prison sentences were grossly disproportionate. In so holding, the court observed that a sentence violates the *Eighth Amendment* if it is "so severe as to shock the conscience of society." *Id.* at 388, P49, 79 P.3d at 75 (quotation omitted). This language, however, must be understood as a restatement of the court's conclusion that the sentences were "grossly disproportionate" under the standard set forth in the plurality opinions in *Harmelin* and *Ewing*, which *Davis* expressly followed. *Davis* was not suggesting a different standard by its use of the phrase "shock the conscience of society."[4]

Davis acknowledged, and we here reaffirm, that a sentencing scheme that does not violate the *Eighth Amendment* in its general application may still, in its application to "the

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4. In *State v. Davis*, 108 Ariz. 335, 337, 312 P.2d 202, 204 (1972), this court rejected an *Eighth Amendment* challenge to a mandatory ten-year sentence for a recidivist offender, but noted that "in a proper case and at a proper time we may find that a particular penalty is so severe as to shock the conscience of society" and thus violate the *Eighth Amendment*. Prior to *Ewing* and *Harmelin*, this court said that it would judge whether a sentence "shocks the conscience of the community" for *Eighth Amendment* purposes by whether it is "overly severe or disproportionate to the crime." *State v. Bartlett*, 164 Ariz. 229, 233, 792 P.2d 692, 696 (1990), *vacated*, 501 U.S. 1246, 111 S. Ct. 2880, 115 L. Ed. 2d 1046 (1991). The Supreme Court itself has not used the "shocks the conscience" language in its *Eighth Amendment* review of prison sentences, although it has used such language with respect to the different issue of whether state action is so arbitrary as to violate substantive due process. *See Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952).

specific facts and circumstances" of a defendant's offense, result in an unconstitutionally disproportionate sentence. *Id.* at 384, P34, 79 P.3d at 71. Berger, however, misunderstands how the "specific facts and circumstances of the offenses" enter into the *Eighth Amendment* analysis under *Davis*.

The court in *Davis* effectively concluded that it could not reconcile the particular sentences imposed with any reasonable sentencing policy it could attribute to the legislature. Most significantly, the defendant in *Davis*, who had no prior criminal record, was caught up in the "broad sweep" of a statute that made no distinction between the perpetrators of incest, serial pedophiles, and an eighteen-year-old man engaging in sex initiated by a fifteen-year-old girlfriend. *Id.* at 384-85, PP36-37, 79 P.3d at 71-72. The statute's breadth in terms of imposing liability was coupled with a sentencing scheme mandating lengthy consecutive sentences for each offense. *Id.* at 385, P37, 79 P.3d at 72.

In *Davis*, objective facts about the offenses indicated that the defendant's conduct was at the edge of the statute's broad sweep of criminal liability. Davis was twenty years old and his maturity and intelligence fell far below that of a normal adult. *Id.* at 384-85, P36, 79 P.3d at 71-72. The girls involved not only participated willingly, but they had sought Davis out and gone voluntarily to his home. *Id.* If the girls had been fifteen or older and Davis within two years of their age, he would not have been criminally liable at all. A.R.S. § 13-1407(F). But because his conduct was "swept up in the broad statutory terms," *Davis*, 206 Ariz. at 385, P37, 79 P.3d at 72, Davis was subject to four consecutive thirteen-year sentences.

Only after concluding that objective factors about Davis's offense showed he had been caught up in the expansive reach of the statute did the court determine that the consecutive nature of his sentences was relevant to the *Eighth Amendment* analysis. *Id.* at 387, P47, 79 P.3d at 74. In so doing, however, the court noted that its conclusion rested on the "specific facts and circumstances of Davis's offenses," and reaffirmed that the court "normally will not consider the imposition of consecutive sentences in a proportionality inquiry. . . ." *Id.* at 387-88, PP47-48, 79 P.3d at 74-75.

Berger argues that, in light of *Davis*, the court must consider the consecutive nature of his sentences in the *Eighth Amendment* analysis, along with the "victimless" nature of his crime, and that this court must, at the least, order a resentencing hearing so he can present "mitigation evidence."

Berger's conduct is at the core, not the periphery, of the prohibitions of A.R.S. § 13-3553(A)(2) - the knowing possession of visual depictions of sexual conduct involving minors - and he, unlike Davis, cannot be characterized as someone merely "caught up" in a statute's broad sweep. Thus, there is no basis here to depart from the general rule that the consecutive nature of sentences does not enter into the proportionality analysis.[5]

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5. Berger has no prior criminal record, and *Davis* noted that the defendant there had no prior adult criminal record. 206 Ariz. at 385, P36, 79 P.3d at 72. This fact is not in itself a basis for challenging a mandatory prison sentence as grossly disproportionate.

(Cont'd)

Nor do we accept Berger's assertion that his crimes were "victimless" merely because he did not touch or even photograph any children himself. The defendant in *Harmelin* similarly argued that his sentence to life without parole was unconstitutional because his possession of 672 grams of cocaine was a victimless and non-violent offense. In rejecting this argument, Justice Kennedy noted the pernicious effects of the drug trade, including drug-related violence. 501 U.S. at 1002-03. Here, the link between possession of the contraband images and the abuse of children is at least as direct. Production of the images Berger possessed required the abuse of children, and Berger's consumption of such material cannot be disassociated from that abuse for purposes of the *Eighth Amendment* proportionality analysis. *Cf. Norris*, 159 F.3d at 930 (noting, for purposes of federal sentencing guidelines, that "the victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from

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(Cont'd)

See Harmelin, 501 U.S. at 994-95 (rejecting defendant's contention that mandatory life sentence for first time offender was "cruel and unusual"). An offender's lack of prior convictions also does not alter the general rule that proportionality review focuses on the particular sentence for each offense rather than the cumulative sentences. For purposes of proportionality review, a prior criminal record may, however, increase the gravity of the offense that underlies a challenged prison sentence. *See Ewing*, 538 U.S. at 29 ("In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of criminal recidivism."). For example, this court may well have reached a different result in *Davis* if the defendant had prior adult criminal convictions.

the arguably more culpable offenses of producing or distributing child pornography").

Alternatively, Berger asks this court to remand his case for an evidentiary hearing in light of *Davis*. He notes that, when he was sentenced, our court's *Eighth Amendment* case law did not allow a judge to consider the individual facts and circumstances of the crime committed, *see State v. DePiano*, 187 Ariz. 27, 29-30, 926 P.2d 494, 496-97, and *Davis* overruled that holding, 206 Ariz. at 384, P34, 79 P.3d at 71.

Davis, however, does not interpret the *Eighth Amendment* to generally require evidentiary hearings to allow defendants to offer "mitigation evidence" to show that a particular sentence is disproportionate. The specific facts and circumstances considered relevant in *Davis* are those that go to the defendant's degree of culpability for the offense, not to a showing that the defendant is, apart from the crime at issue, a good person or a promising prospect for rehabilitation. *Cf. Davis*, 206 Ariz. at 384, P32, 79 P.3d at 71 (citing cases from other jurisdictions that consider defendant's culpability and harm caused by offense as part of proportionality analysis).

In *Harmelin*, the Court held that the *Eighth Amendment* does not require courts to consider mitigation evidence before imposing mandatory prison sentences, even when a mandatory life term results. 501 U.S. at 996 (Scalia, J., announcing judgment of the Court); *id.* at 1006 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy noted that the Court's *Eighth Amendment* decisions

"reject any requirement of individualized sentencing in noncapital cases," and that the Court had "never invalidated a penalty mandated by a legislature based only on the length of a sentence, and especially with a crime as severe as this one, [a court] should do so only in the most extreme circumstance." *Id.* at 1006-07 (Kennedy, J., concurring in part and concurring in the judgment). *Davis* does not question these propositions.

Further, Berger has not identified any fact that he might offer on remand that would alter our conclusion that his sentences are not grossly disproportionate. At the time of his arrest, Berger was a fifty-two-year-old high school teacher, was married, and had no prior criminal record. These facts, which are in the record, do not reduce his culpability. The trial evidence showed that Berger knowingly sought and possessed numerous items of contraband child pornography over an extended period of time. Accordingly, considering "the specific facts and circumstances" of Berger's crimes only amplifies the conclusion that he consciously sought to do exactly that which the legislature sought to deter and punish. *See Seritt v. Alabama*, 731 F.2d 728, 737 (11th Cir. 1984) (rejecting habeas claimant's argument for an evidentiary hearing when circumstances of the crime were demonstrated in the record).

VI.

Penalties as severe and unforgiving as those imposed here, as Justice Kennedy noted in *Harmelin*, present "a most difficult and troubling case for any judicial officer." 501 U.S. at 1008 (Kennedy, J., concurring in part and concurring in

the judgment). But "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts." *Id.* at 998 (internal quotations omitted). Moreover, subject to constitutional limits, "[w]e recognize society's strong interest in protecting children and understand and appreciate that it is the legislature's province to assess the appropriate punishment for crimes against children." *Davis*, 206 Ariz. at 385, P37, 79 P.3d at 72.

In light of the legislature's intent to deter and punish those who participate in the child pornography industry, and Berger's commission of twenty separate offenses, we hold that the twenty consecutive ten-year sentences are not grossly disproportionate to his crimes. We vacate the part of the opinion of the court of appeals that addresses the *Eighth Amendment* issue, and we affirm the sentences.

W. Scott Bales, Justice

CONCURRING:

Ruth V. McGregor, Chief Justice
Michael D. Ryan, Justice
Andrew D. Hurwitz, Justice

Appendix A

CONCUR BY: Andrew D. Hurwitz; Rebecca White Berch (In Part)

CONCUR: HURWITZ, Justice, concurring

I fully concur in the analysis and result reached by the majority in this case. I write briefly in response to Justice Berch's eloquent concurring and dissenting opinion. As a policy matter, there is much to commend Justice Berch's suggestion that the cumulative sentence imposed upon Mr. Berger was unnecessarily harsh, and my personal inclination would be to reach such a conclusion. As a judge, however, I cannot conclude under the Supreme Court precedent or even under the alternative test that Justice Berch proposes that Berger's sentences violate the United States Constitution.

A.

The issue in this case is whether the twenty consecutive sentences that Berger received for twenty separate crimes violate the *cruel and unusual punishment clause of the Eighth Amendment.*[6] In my view, proof of an *Eighth Amendment* violation can only be premised on (a) a conclusion that a ten-year sentence for one count of sexual exploitation of a minor

6. This case does not require us to confront the question of whether the *Eighth Amendment* can in some circumstances be violated by consecutive sentences for crimes essentially constituting one occurrence. Thus, for example, we need not today decide whether similar sentences would be appropriate if Berger downloaded the images at one sitting, or possessed a book with twenty illegal photographs inside.

through knowing possession of child pornography itself is so disproportionate to the crime as to be cruel and unusual, or (b) that even if a ten-year sentence for one count is constitutional, twenty such consecutive sentences are not.

As Justice Berch quite correctly suggests, and as the Supreme Court itself has admitted, the Court's "proportionality decisions have not been clear or consistent in all respects." *Harmelin v. Michigan*, 501 U.S. 957, 996, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring). I therefore find merit in Justice Berch's suggestion that objective analysis would be easier if courts were allowed to conduct an intra- and inter-jurisdictional analysis at the outset in order to find an inference of gross disproportionality. However, as Justice Berch candidly admits, the Court has expressly eschewed this very approach. *Id.* at 1005.

But even if we were free to follow Justice Berch's suggested approach, I would not conclude that an inference of gross disproportionality can be drawn here. The initial question is whether a ten-year sentence for one count of this kind of sexual exploitation of a minor is itself unconstitutional. That the Arizona penalty is purportedly the longest in the nation does not of course, establish disproportionality. *See Rummel v. Estelle*, 445 U.S. 263, 281, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980). There will always be one state with the longest penalty, and if that were enough to establish an *Eighth Amendment* violation, the result would be a revolving door under which the penalty for the next state in line would then be automatically unconstitutional. *See id.* at 282.

Nor can I conclude that inter-jurisdictional comparisons demonstrate that the penalty Berger received for a single count is disproportionate to the penalty that could be imposed elsewhere for a single such offense. The federal sentencing guidelines in effect when Berger was sentenced recommended a sentence of fifty-seven to seventy-one months for possession of one (or more) proscribed depictions, but the governing statute allowed a sentence of up to fifteen years for one offense.[7] As Justice Berch notes, at least nine other states allow (but do not require) a ten-year penalty, and four states permit a greater penalty. Such is not the stuff of gross disproportionality.

Nor does an intra-jurisdictional comparison lead to a different result. It is tempting to compare Berger's accumulated consecutive sentences to the maximum sentence for second degree murder or sexual assault. But the question, of course, is not what a defendant who commits one murder or one sexual assault faces as a potential sentence, but rather what one who commits twenty such offenses faces. It cannot be suggested that a 200-year sentence for twenty murders or twenty rapes would be disproportionate.

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7. This range is based on an assumed violation of 18 U.S.C. § 2252(a)(2) (2000), an assumed offense conduct level of twenty-five, U.S. Sentencing Guidelines ("USSG") § 2G2.2 (2002), and a criminal history category for a first-time offender, USSG Ch. 5, pt. *A*, Sentencing Table. The federal guidelines today recommend a sentence of seventy-eight to ninety-seven months for one such offense, USSG § 2G2.2 (West, Westlaw through 2006), but the governing statute allows a sentence of up to twenty years, 18 U.S.C. §§ 2252(b)(1) (West, Westlaw through 2006).

As Justice Berch suggests, her real concern is not that a defendant *can* receive a ten-year sentence for each offense, or that a court *can* impose consecutive sentences for multiple offenses, but rather that Arizona law *requires* that a court impose consecutive ten-year sentences for each offense. Yet, as Justice Berch correctly notes, the Supreme Court - whose *Eighth Amendment* interpretations bind us - has rejected the notion that mandatory flat sentences violate the Constitution because they do not allow consideration of the particular situation of the offender. *Harmelin*, 501 U.S. at 1006-07 (Kennedy, J., concurring). Nor does Supreme Court precedent allow us to find consecutive sentences for separate crimes unconstitutional if the individual sentences for each crime are not. *See Lockyer v. Andrade*, 538 U.S. 63, 74 n.1, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).

B.

I thus conclude that the majority opinion faithfully applies the Supreme Court's *Eighth Amendment* disproportionality jurisprudence. I do so reluctantly, however. What is troublesome here - as Justice Berch points out - is that the punishment for Berger's admittedly serious offenses intuitively *seems* too long. If I were a legislator, I would be free to find such a long sentence shocking to my conscience and vote for a less draconian sentencing scheme. But the test for violation of the Constitution is not my personal conscience nor whether a sentence subjectively is bothersome to me. The Supreme Court has held that a defendant may receive a life sentence for the commission of three felonies, none of which in and of themselves could result in a long term of imprisonment. *Ewing v. California*, 538 U.S. 11, 30-31, 123 S. Ct. 1179,

155 L. Ed. 2d 108 (2003). If this is the case, I cannot conclude that consecutive sentences for separate felonies turns an otherwise legal sentence into one that violates the Constitution.

Benjamin Cardozo long ago noted the correct role of the judge in difficult areas such as this:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

B. Cardozo, *The Nature of the Judicial Process* 141 (1921).

This is the kind of case that tests the limits of Cardozo's wisdom and our discipline as judges. But unless and until the Supreme Court changes its interpretation of the *Eighth Amendment*, I am constrained to conclude that the legislature is empowered to require the sentences that Berger received.

Andrew D. Hurwitz, Justice

DISSENT BY: Rebecca White Berch (In Part)

DISSENT: BERCH, Vice Chief Justice, concurring in part and dissenting in part

A mitigated sentence of 200 years for possession of twenty images of child pornography, without the possibility of pardon or early release, is extraordinarily long. While courts must defer to the legislature in setting sentencing ranges, the Supreme Court has recognized a "narrow proportionality principle" inherent in the *Eighth Amendment* that prohibits sentences that are "grossly disproportionate" to the crime. *Harmelin v. Michigan*, 501 U.S. 957, 996-97, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring).[8]

The question is how to determine whether the sentence at issue is grossly disproportionate. The Court has stated that reviewing courts must compare the "gravity of the offense" to the "harshness of the penalty." *Ewing v. California*, 538 U.S. 11, 28, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (plurality opinion). If this inquiry gives rise to an "inference" of gross disproportionality, the court must then examine the punishment for similar offenses in other jurisdictions (the inter-jurisdictional analysis) and the punishment for other

8. Although substantial deference is due to legislative judgments regarding sentencing, the notion that the legislature may set any non-capital sentence without regard to proportionality has garnered only two votes. *See Harmelin*, 501 U.S. at 994 (Scalia, J., joined by Rehnquist, C.J.); *Ewing v. California*, 538 U.S. 11, 31, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (Scalia, J., concurring), 32 (Thomas, J., concurring).

offenses in the forum jurisdiction (the intra-jurisdictional analysis). *Solem v. Helm*, 463 U.S. 277, 291, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983). The inquiry is not supposed to be subjective, yet courts are directed not to conduct an inter- and intra-jurisdictional analysis to assist in ascertaining whether a sentence is too long unless they first find an "inference of gross disproportionality," *see Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring), which the courts reviewing this case have not found. My point in this opinion is merely to demonstrate that were we able to conduct such an objective inquiry as a part of our determination of whether a sentence gives rise to an inference of gross disproportionality, the analysis would demonstrate that Arizona's sentence for this crime is by far the longest in the nation and is more severe than sentences imposed in Arizona for arguably more serious and violent crimes. Such objective facts support finding an inference of gross disproportionality.

For example, in the federal system, the sentencing guidelines recommend a sentence of approximately five years (57-71 months) based on the number and type of images Berger possessed. U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 2G2.2 (Supp. 2005) & § 5A (1996).[9] While

9. This sentence is based on an offense level of 25, which both Justice Hurwitz and I agree is the appropriate level under the 2002 sentencing guidelines for one possessing multiple pornographic computer images of children under 12. *See supra* P56 and n.7. Two recent *amendments* have increased the offense level, resulting in a recommended sentence for twenty images of about nine years (97-121 months), or, if a defendant is charged with possessing more

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the Arizona Legislature is free to set its own sentencing ranges, of course, the federal sentences are set by a professional Sentencing Commission, whose opinions the federal courts have deemed entitled to "great weight" because of the Commission's expertise in matters of sentencing. *United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995); *see also Mistretta v. United States*, 488 U.S. 361, 379, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989) (stating that Sentencing Commission is an "expert body"). In setting sentence ranges, this congressionally established Commission examines abundant data and consults experts in each field. That this Commission recommends approximately five years as an appropriate sentence for possession of twenty images suggests that a minimum term of 200 years probably is not merely disproportionate, but grossly disproportionate to the crime.

Arizona's mandatory minimum 200-year sentence also exceeds that imposable in any other state. *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (requiring examination of sentences imposed in other jurisdictions for similar crimes to validate an inference of gross disproportionality). It is the

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than 600 images, a range of eleven to fourteen years (135-168 months). U.S.S.G. §§ 2G2.2 & 5A. Although the federal maximum statutory sentence is, as Justice Hurwitz correctly notes, fifteen years, Berger's conduct would not warrant a maximum sentence. *See* 18 U.S.C. § 2252 (2000). Even if it did, fifteen years would be the total sentence for possession of all twenty images. While the ranges and maximum sentence have been increased to twenty years, Berger's crimes would fall under the 2002 version of the statute.

unique combination of long mandatory minimum sentences, coupled with the requirements that each image be charged separately and that the terms be served consecutively and fully - that is, without possibility of early release - that renders Arizona's sentences extraordinarily long. *See* A.R.S. §§ 13-3553, -604.01 (Supp. 2005). Indeed, the *minimum* ten-year sentence in Arizona for possession of one image is greater than the *maximum* sentence for possession of child pornography in thirty-six states and equal to the maximum sentence in nine other states.[10] Additionally, most other states permit concurrent sentences or grouping of charges. *E.g.*, *State v. Christensen*, 2003 SD 64, 663 N.W.2d 691, 693 (S.D. 2003) (imposing two one-year sentences, to be served concurrently). Only Florida appears to require each image to be a separate count, but each charge there carries a five-year term and is probation eligible.[11]

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10. These figures are based on possession of one image, and are based primarily on the copies of all fifty states' child pornography possession and sentencing statutes provided to the court by the parties in January and February, 2006. The states that allow maximum sentences greater than ten years for one image - Georgia, Mississippi, Tennessee, and Utah - all have minimum sentences of less than ten years. In those states, moreover, sentences may be served concurrently, they need not be served day-for-day, and probation is available. Ga. Code Ann. §§ 16-12-100(b)(8), 42-8-34(a) (West, Westlaw through 2005 Spec. Sess.); Miss. Code Ann. §§ 97-5-33(5), 97-5-35, 47-7-33(1) (West, Westlaw through 2005 5th Extraordinary Sess.); Tenn. Code Ann. §§ 39-17-1003, 40-35-111, 40-35-303(a) (West, Westlaw through 2005 Sess.); Utah Code Ann. §§ 76-5a-3(1), 76-3-203, 77-18-1 (West, Westlaw through 2005 2d Spec. Sess.).

11. Tennessee allows each image to be charged separately if there are fewer than fifty. Tenn. Code Ann. § 39-17-1003(b). In Utah, each minor depicted gives rise to a separate charge. Utah Code Ann. § 76-5a-3(3).

Fla. Stat. Ann. §§ 827.071(5), 775.082(3)(d) (term), 948.01 (probation) (West, Westlaw through 2005 'B' Sess.). In Arkansas, Berger would have been eligible for a sentence of three to ten years, and in Connecticut, possession of twenty images requires a sentence of one to ten years. Ark. Code Ann. §§ 5-27-304(b), 5-4-401(a) (West, Westlaw through 2005 Sess.); Conn. Gen. Stat. Ann. §§ 53a-196e, -35a (West, Westlaw through 2006 Supp.).

While some states provide for enhanced penalties for "second or subsequent" offenses, that term is defined as later offenses not charged at the same time. *See, e.g., Miles v. State*, 51 So. 2d 214, 215 (Miss. 1951); *McGervey v. State*, 114 Nev. 460, 958 P.2d 1203, 1207 (Nev. 1998). By that definition, Berger is a first-time offender. In most states, Berger's sentence would not exceed five years, and he would also have the possibility of probation or early release. *See, e.g.*, Cal. Penal Code § 311.11(a) (West, Westlaw through 2006 Sess.) (up to twelve months); N.M. Stat. Ann. §§ 30-6A-3(A), 31-18-15(A)(9) (West, Westlaw through 2006 Sess.) (up to eighteen months). Thus, if the Supreme Court's jurisprudence permitted the court to examine the sentences imposed in other jurisdictions for similar crimes - the inter-jurisdictional analysis mentioned in *Solem*, *Harmelin*, and *Ewing* - the analysis would support the inference that Berger's 200-year sentence is grossly disproportionate.

Moreover, the sentence at issue is longer than that imposed in Arizona for many crimes involving serious violence and physical injury to the victim. Second degree murder, for example, like possession of child pornography,

also carries a minimum sentence of ten years, *see* A.R.S. § 13-710(A) (2001), but a term imposed for a murder may be served concurrently with sentences imposed for other crimes. Similarly, the *minimum* sentence for possession of an image of child pornography is longer than the *presumptive* sentence for rape or aggravated assault. *See* A.R.S. §§ 13-1406(B) (2001) (seven years for rape), 13-1204(B), -701(C)(2) (2001) (3.5 years for aggravated assault). A presumptive sentence for possession of two images of child pornography (thirty-four years) is harsher than the sentences for second degree murder or sexual assault of a child under twelve (twenty years). *See* A.R.S. § 13-604.01(B), (D) (Supp. 2005). Even a mitigated sentence for possession of five images (fifty years) amounts as a practical matter to a life sentence without parole, more serious than the sentence imposed for virtually any crime in the state. For molesting a child, one might receive the same sentence that Berger has received for possessing one picture.[12] *See* A.R.S. § 13-604.01(D). Indeed, sexual exploitation of a minor, the offense with which Berger was charged, is the only "dangerous crime against children" that by definition does not involve contact with any children. Yet a defendant may easily accrue a very lengthy sentence. The Supreme Court has said that "[i]f more serious crimes are subject to the same penalty, or to less serious penalties,

12. These facts might lead victims of violent crime to think that the legislature and justice system care less about their injuries and losses than it does about punishing those who possess pornographic images. *See United States v. Angelos*, 345 F. Supp. 2d 1227, 1251 (D. Utah 2004) ("[C]rime victims expect that the penalties the court imposes will fairly reflect the harms that they have suffered."), *aff'd by* 433 F.3d 738 (10th Cir. 2006).

that is some indication that the punishment at issue may be excessive." *Solem*, 463 U.S. at 291. This factor as well indicates the extraordinary nature of the sentence in this case. *See id.* at 299.[13]

The majority correctly observes, however, that Berger was convicted of not one, but twenty serious felonies. Op. P25. Moreover, my colleagues note, we must look at the sentences for the individual crimes, Op. P27, and defer to the legislature's requirement of mandatory sentences. Op. P32. From this, my colleagues derive the proposition that the court may not consider the consecutive nature of Berger's sentences in determining whether the total is grossly disproportionate to the seriousness of Berger's crimes, Op. P27, nor may we consider the mandatory flat nature of the sentences.

I agree that the Supreme Court has implied as much when dealing with statutes different from those now before us. *Lockyer v. Andrade*, 538 U.S. 63, 74 n.1, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (consecutive sentences); *Harmelin*, 501 U.S. at 1006-07 (Kennedy, J., concurring) (mandatory sentences). But in determining whether a total sentence is grossly disproportionate to the crime for which it was meted out as punishment, we must deal with the sentence imposed

13. Terrorist co-conspirator Zacarias Moussaoui was recently sentenced to two life sentences in prison - the equivalent of the sentence Berger received - for Moussaoui's involvement in the terrorist acts that led to the deaths of nearly 3000 people on September 11, 2001. *United States v. Moussaoui*, Crim. No. 01-455-A (E.D. Va. May 4, 2006).

as a whole and not shield ourselves from the full impact of the sentence by analyzing only one charge and sentence. Arizona's sentencing scheme requires very long, mandatory sentences that must be served consecutively and fully, with no possibility of probation, pardon, or early release. These combined features affect the real-world sentences defendants must serve, and we should not allow these unique features and the resulting sentences to escape review by focusing only on the sentence for one charge. We suggested as much in *State v. Davis*, 206 Ariz. 377, 387-88, P47, 79 P.3d 64, 74-75 (2003).

Arizona's sentencing scheme is unique in coupling extraordinarily long terms with mandatory stacking requirements, and in requiring that each sentence be fully served, without possibility of early release. The compounding impact of this triple whammy should not escape scrutiny. While great deference is owed to the legislature's choice to impose stringent sentences, the constitution imposes on this court the obligation to determine whether the resulting sentence is cruel and unusual in light of the circumstances of an individual case.

The Supreme Court requires the court to measure the gravity of the crimes for which Berger was convicted possession of twenty graphic images of child pornography - against the severity of the sentence imposed. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). In weighing the gravity of the offenses, the court may consider the defendant's criminal history, *see Ewing*, 538 U.S. at 29 (plurality opinion), as well as the "harm caused or threatened to the

victim or society, and the culpability of the offender." *Solem*, 463 U.S. at 292.

Berger has no prior criminal record. He was convicted of possessing twenty grossly obscene images depicting young children engaged in lewd acts. He was not involved in making any of the photographs and the record contains no evidence that he purchased the items or intended to sell them. They appear to be images he downloaded from the Internet. Although purchase of such items undoubtedly drives the market for their production, it is unclear that mere possession does so.

While the legislature may choose to punish severely those who support the child pornography industry because of pornography's extremely deleterious effect on those degraded and harmed in its making, due process notions of individualized and appropriate sentencing require consideration of the fact that Berger engaged in no force or violence, made no threats of force or violence, and did not physically injure anyone. *See Burns v. United States*, 287 U.S. 216, 220, 53 S. Ct. 154, 77 L. Ed. 266 (1932) (setting forth due process requirement of individualized sentencing). Indeed, there is no evidence that Berger has ever touched any child improperly. That absence of direct violence affects the assessment of society's interest in punishing his acts so severely. *See Rummel v. Estelle*, 445 U.S. 263, 275, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980).

Although the Supreme Court has confirmed that a limited proportionality principle inheres in the *Eighth Amendment* to prevent sentences that are "grossly disproportionate" to

the crime committed, *Ewing*, 538 U.S. at 23 (plurality opinion), that Court has only twice struck a sentence as being so grossly disproportionate to the crime as to violate the *Eighth Amendment. See Solem*, 463 U.S. at 303; *Weems v. United States*, 217 U.S. 349, 382, 30 S. Ct. 544, 54 L. Ed. 793 (1910). In *Solem*, the Court held that imposing a life sentence for passing an "insufficient funds" check violated the *Eighth Amendment's* requirement that sentences not be grossly disproportionate to the crime committed. 463 U.S. at 303. In the case before us, Berger was sentenced to 200 years - more than two and one-half lifetimes, from birth to death - for possessing twenty lewd and obscene photographs.

While one can rationalize that the defendant here was convicted of twenty felonies rather than one, other considerations mitigate the importance of that factor. Unlike other crimes, which tend to occur in relative isolation, those who possess pornography tend to possess more than one image. Because possession of each image constitutes a separate crime and the minimum sentence for each crime is ten years, the sentences quickly mount up. Moreover, in this case, Berger had no chance to rehabilitate between convictions because he was convicted on all twenty counts on one occasion.

I do not condone Berger's crimes. Child pornography is a serious offense. *See* 1978 Ariz. Sess. Laws, ch. 200, § 2; *see also State v. Taylor*, 160 Ariz. 415, 422, 773 P.2d 974, 981 (1989). I concur in the majority's analysis of the crime itself and of the legislature's right to impose severe penalties for it. *See* Op. PP18-23. I further agree that Berger's crimes,

unlike the crimes at issue in *Davis*, were precisely the type of criminal acts the legislature intended to punish. 206 Ariz. at 385, P37, 79 P.3d at 72. Berger was not "swept up" in an overly broad categorization, as was the defendant in *Davis*. *Id.*

Nonetheless, sentences must not only reflect the seriousness of the offense and deter the defendant and others from committing future crimes, they should also promote respect for law. We are not asked to determine in this case whether a sentence of ten years would ever be appropriate for possession of a pornographic image. It might be. We are asked instead to determine whether in this case, 200 years is just punishment for a defendant who possessed child pornography, but directly harmed no one. An objective examination of the 200-year sentence reveals that it far exceeds the sentence imposed for similar crimes in any jurisdiction and exceeds the penalties regularly imposed in Arizona for crimes that result in serious bodily injury or even death to victims. The sentence provides no opportunity for rehabilitation and provides no second chance. Instead, it imposes on the taxpayers the burden of supporting the defendant for the rest of his life. Such a sentence seems incompatible with "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958).

The foregoing analysis would support an inference of gross disproportionality, if the court had drawn such an inference. But it didn't. Given that result, it is difficult to envision when the court would ever find a term of years to

be disproportionate to the gravity of the crime and the harm to the public.[14]

In conclusion, I concur in the court's statements of the rules emanating from the *Harmelin* line of Supreme Court cases and its interpretation of *Davis*. I also agree that exploitation of children is a serious crime and that the legislature has responsibility for defining crimes and setting the sentencing ranges for those crimes. I disagree only in that I would find that a minimum mandatory sentence of 200 years for possession of twenty pornographic images raises an inference of gross disproportionality that requires additional analysis before ultimately the court determines whether the sentence is unconstitutionally disproportionate.

Rebecca White Berch, Vice Chief Justice

14. The governor generally has the power to grant pardons or commute sentences. A.R.S. § 31-443 (2002). In this case, however, the statute setting forth the sentence purports to preclude that remedy. A.R.S. § 13-604.01(G) (providing that defendant is not subject to pardon or early release). Moreover, it would be a brave politician who ventured to reduce the sentence of a sex offender. For those reasons, among others, courts have a role, although a limited one, in determining the constitutionality of sentences of terms of years.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF ARIZONA, DIVISION ONE, DEPARTMENT D FILED DECEMBER 14, 2004

COURT OF APPEALS OF ARIZONA
DIVISION ONE, DEPARTMENT D

1 CA-CR 03-0243

STATE OF ARIZONA,

Appellee,

v.

MORTON ROBERT BERGER,

Appellant.

December 14, 2004, Filed

OPINION

OPINION BY: SUSAN A. EHRLICH

EHRLICH, Judge

Morton Robert Berger appeals his twenty convictions and sentences for sexual exploitation of a minor based on his possession of child pornography. He argues (1) that to punish the possession of child pornography more than the indecent exposure depicted in the images violates the federal and state constitutional guarantees of the equal protection of

the law; (2) that the legislative approach to the possession of child pornography when compared with its approach to the commercial production of child pornography also violates the guarantees of equal protection; (3) that the cumulative sentence violates the federal and state constitutional prohibitions against cruel and unusual punishment; and (4) that the severity of his sentences warrants reduction by this court. We conclude that the legislature's means of addressing the matter of child pornography is constitutional and that it is not appropriate for this court to reduce Berger's sentences. Accordingly, we affirm his convictions and sentences for reasons that follow.

FACTUAL AND PROCEDURAL HISTORY

Berger was charged with thirty-five counts of sexual exploitation of a minor younger than fifteen years of age in violation of Arizona Revised Statutes ("A.R.S.") § 13-3553(A) (Supp. 2004).[1] Each offense is a class 2 felony and dangerous crime against children punishable by a prison term of ten to twenty-four years without the possibility of probation, early release or pardon, and each sentence must be served consecutively. A.R.S. § 13-3553(C); *see also* A.R.S. §§ 13-604.01 (Supp. 2004), 13-702 (Supp. 2004).

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1. A. A person commits sexual exploitation of a minor by knowingly:

* * *

2. . . . possessing . . . any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.

Appendix B

In a trial motion challenging the constitutionality of A.R.S. § 13-3553, Berger contended that the sentencing scheme as applied to him constituted cruel and unusual punishment in violation of the *Eighth Amendment* to the United States Constitution and Article 2, section 15 of the Arizona Constitution.[2] He specifically argued that there was a gross disproportionality between the offenses with which he had been charged and the mandatory minimum sentence facing him as a middle-aged first offender and a married teacher with children of his own who had no criminal history and who did "no more than possess images" produced and distributed by other, unknown individuals. He also maintained that the sentence he faced was grossly disproportionate when compared to sentences for other crimes in Arizona and to sentences for the same crime in other states.

The trial court denied the motion, relying in part on *State v. DePiano*, 187 Ariz. 27, 926 P.2d 494 (1996), *cert. denied*,

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2. The *Eighth Amendment* and Article 2, § 15, are virtually identical. The *Eighth Amendment* provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," whereas in the Arizona Constitution the singular "punishment" is used. In *State v. Davis*, 206 Ariz. 377, 380-81 P12, 79 P.3d 64, 67-68 (2003), *cert. denied*, 541 U.S. 1037, 158 L. Ed. 2d 723, 124 S. Ct. 2097 (2004), the Arizona Supreme Court considered whether Arizona's constitutional prohibition against cruel and unusual punishment provided greater protection than its federal counterpart, but it found no compelling reason to so find and neither do we.

519 U.S. 1093, 136 L. Ed. 2d 726, 117 S. Ct. 782 (1997).[3] It found, first, that the sentence was not grossly disproportionate given the societal harm of child pornography and, second, that the mandated imposition of consecutive sentences, each a minimum of ten years in prison, did not result in cruel and unusual punishment.

Upon the prosecutor's motion, the trial court dismissed fifteen counts of the indictment, and the jury found Berger guilty as charged in the remaining twenty counts. The court sentenced Berger to the minimum and mitigated sentence, twenty consecutive ten-year terms of imprisonment, and Berger appealed.

DISCUSSION

A. The Constitutional Guarantees of Equal Protection

Berger contends that imposing a punishment for the possession of child pornography that is more severe than the punishment for the act of indecent exposure being portrayed violates the federal and state constitutional guarantees of the equal protection of the law.[4] He also contends that his guarantee of equal protection is violated because the legislature imposed the same range of punishment both for

3. The court in *DePiano* favored an *Eighth Amendment* approach that did not analyze the particular circumstances of the crime or the offender. After Berger's sentencing, *DePiano* was overruled in *Davis*, 206 Ariz. at 384 P34, 79 P.3d at 71.

4. The former is a class 2 felony, A.R.S. § 13-3553(C), while the latter is a class 6 felony. A.R.S. § 13-1402(B) (2001).

sexual exploitation of a minor and for commercial sexual exploitation of a minor, although commercial sexual exploitation is a more serious crime. Constitutional challenges to a statute are reviewed de novo by this court. *Martin v. Reinstein*, 195 Ariz. 293, 301 P16, 987 P.2d 779, 787 (App. 1999).

The state and federal equal-protection guarantees "have for all practical purposes the same effect[,]" *Valley Nat'l Bank of Phoenix v. Glover*, 62 Ariz. 538, 554, 159 P.2d 292, 299 (1945), and Berger does not contend otherwise. They "are designed to secure equal opportunity for those who are similarly situated." *Martin*, 195 Ariz. at 309 P49, 987 P.2d at 795; *see State v. Navarro*, 201 Ariz. 292, 298 P25, 34 P.3d 971, 977 (App. 2001); *Glover*, 62 Ariz. at 554-55, 159 P.2d at 299-300. Equal protection, however, "does not require that all persons be treated alike, only that individuals within a certain class be treated equally and that there exist reasonable grounds for the classification." *Navarro*, 201 Ariz. at 298 P25, 34 P.3d at 977 (quoting *In re Maricopa County Juv. Action No. J-72804*, 18 Ariz. App. 560, 565, 504 P.2d 501, 506 (1972)).

The legal standard applicable to the legislature's distinctions between one who possesses child pornography and one who engages in acts of indecent exposure, and between one who engages in the sexual exploitation of a minor and one who engages in the commercial sexual exploitation of a minor, is the same: whether there is a rational basis for the distinction given that the statutory design implicates neither a suspect class nor a fundamental right.

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See City of Tucson v. Pima County, 199 Ariz. 509, 516 P21, 19 P.3d 650, 657 (App. 2001).

> Rational basis review imposes on Petitioners, as the parties challenging the constitutionality of the Act, the burden of establishing that the law is unconstitutional by demonstrating that there is no conceivable basis for the Act. A legislative enactment challenged under the rational basis test will pass constitutional muster unless it is proved beyond a reasonable doubt to be wholly unrelated to any legitimate legislative goal. Moreover, the law "need not be in every report logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

Martin, 195 Ariz. at 309-10 P52, 987 P.2d at 795-96 (citations omitted); *see State v. Smith*, 166 Ariz. 450, 453, 803 P.2d 443, 446 (App. 1990) (A statute fails if its classification is based on reasons "wholly irrelevant to the achievement of the state's objectives." (Quoting *Bryant v. Cont'l Conveyor Equip. Co.*, 156 Ariz. 193, 196-97, 751 P.2d 509, 512-13 (1988)); *State v. Hammonds*, 192 Ariz. 528, 531 P8, 968 P.2d 601, 604 (App. 1998) ("[A] statute must be rationally related to furthering a legitimate governmental interest."); *State v. McInelly*, 146 Ariz. 161, 163, 704 P.2d 291, 293 (App. 1985) (If the legislative reasoning is related to public health, safety or welfare, we will not question the legislature in passing the statute.).

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"It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Osborne v. Ohio*, 495 U.S. 103, 109, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 756-58, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)). The legislature's designation of possession of child pornography as a class 2 felony and dangerous crime against children is a legitimate statement from Arizona's elected representatives about the harm caused by such materials; it does not violate equal protection.

As to Berger's first contention, the class of persons who engage in acts of indecent exposure does pose a different harm than does the class of persons who possess child pornography. Contrary to an act of indecent exposure, which ends upon completion of the act, the victimization of a child continues when that act is memorialized in an image. *See Ferber*, 458 U.S. at 759 ("The materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." (Footnote omitted)); *United States v. Norris*, 159 F.3d 926, 929 (5th Cir. 1998), *cert. denied*, 526 U.S. 1010, 143 L. Ed. 2d 219, 119 S. Ct. 1153 (1999) ("Unfortunately, the 'victimization' of the children involved does not end when the pornographer's camera is put away."). "The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *Osborne*, 495 U.S. at 109 (quoting *Ferber*, 458 U.S. at 756-58); *see State v. Hazlett*, 205 Ariz. 523, 527 P11, 73 P.3d 1258, 1262 (App. 2003) ("The crime is the abuse of the children." (Footnote omitted.)).

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As to Berger's second contention, it is reasonable for the state legislature to conclude that the possession of child pornography drives that industry and that the production of child pornography will decrease if those who possess the product are punished equally with those who produce it. *See Osborne*, 495 U.S. at 109-110 ("It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."); *id.* at 111 ("The State's ban on possession and viewing encourages the possessors of these materials to destroy them."); *Ferber*, 458 U.S. at 756-64 (discussing reasons for prohibiting child pornography, including economic motive); *Norris*, 159 F.3d at 930 ("There is no sense in distinguishing . . . between the producers and the consumers of child pornography. Neither could exist without the other."); *United States v. Ketcham*, 80 F.3d 789, 793 (3rd Cir. 1996) (Statute making criminal "subsequent transportation, distribution, and possession of child pornography discourages its production by depriving would-be producers of a market."); *State v. Taylor*, 160 Ariz. 415, 420, 773 P.2d 974, 979 (1989) (By penalizing possession and production equally, the legislature "conveys a statutory intent that the consumer of child pornography be dealt with severely."); *State v. Emond*, 163 Ariz. 138, 142, 786 P.2d 989, 993 (App. 1989) ("Drying up the market *is* the only way to effectively combat the production of child pornography."). As the federal legislature has found, the possession of child pornography "inflames the desires of child molesters, pedophiles, and child pornographers." *Norris*, 159 F.3d at 930 (quoting *Child Pornography Prevention Act of 1996*, Pub.L. 104-208, § 121, 110 Stat. 3009-27); *see also Osborne*, 495 U.S. at 111 ("Evidence

suggests that pedophiles use child pornography to seduce other children into sexual activity." (Footnote omitted.)).

The State has more than a passing interest in forestalling the damage caused by child pornography; preventing harm to children is, without cavil, one of its most important interests. *See, e.g., Osborne*, 495 U.S. at 110-111 ("Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault [the State] for attempting to stamp out this vice at all levels in the distribution chain. . . . Indeed, 19 States have found it necessary to proscribe the possession of this material." (Footnote omitted.)). The legislature's designation of possession of child pornography as a more serious offense than the act of indecent exposure[5] and its refusal to distinguish between the commercial and non-commercial sexual exploitation of minors is rationally related to furthering the State's interest in protecting children. Berger's constitutional guarantees of equal protection are not violated.[6]

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5. It is more than legitimate for the legislature to so distinguish between the offenses of possession of child pornography, a class 2 felony, and indecent exposure, a class 6 felony; indeed, there is no parallel. The crime of indecent exposure has been denominated by the legislature as a lesser felony because the act, while intentional, is performed with a reckless disregard to the nature of the offense. The possession of images in which children perform or adults respond to children with acts of indecent exposure is a societal harm of a proportionately greater degree.

6. Berger contended that A.R.S. § 13-3553 is unconstitutionally overbroad, but he since has conceded that this issue was addressed and rejected in *Hazlett*, 205 Ariz. 523, 73 P.3d 1258.

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B. Whether Application of A.R.S. § 13-3553 Resulted in Cruel and Unusual Punishment

Berger argues that the application of A.R.S. § 13-3553(C) to him resulted in a cumulative sentence that is unconstitutionally cruel and unusual punishment. This challenge to the statute is reviewed de novo. *Martin*, 195 Ariz. at 301 P16, 987 P.2d at 787.

"The *Eighth Amendment* prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." *Ewing v. California*, 538 U.S. 11, 21, 123 S. Ct. 1179, 1185, 155 L. Ed. 2d 108 (2003) (quoting *Rummel v. Estelle*, 445 U.S. 263, 271, 63 L. Ed. 2d 382, 100 S. Ct. 1133 (1980)); *see Solem v. Helm*, 463 U.S. 277, 284, 77 L. Ed. 2d 637, 103 S. Ct. 3001 (1983) (*Eighth Amendment* prohibits "sentences that are disproportionate to the crime committed."); *see also Lockyer v. Andrade*, 538 U.S. 63, 72, 123 S. Ct. 1166, 1173, 155 L. Ed. 2d 144 (2003) (There is "one governing legal principle" in *Eighth Amendment* jurisprudence: "A gross disproportionality principle is applicable to sentences for terms of years."). While the "precise contours" of this proposition may be unclear, it nonetheless is applicable only in the "exceedingly rare" and "extreme" cases. *Andrade*, 538 U.S. at 73, 123 S. Ct. at 1173 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (Kennedy, J., concurring in part and concurring in judgment) (other citations omitted); *Rummel*, 445 U.S. at 272 ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.") (cited in *Harmelin*, 501 U.S. at 1001).

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The judicial reserve in declaring punishments unconstitutional because cruel and unusual is consistent with the deference to which the legislature is due. Indeed, one of the principles of *Eighth Amendment* proportionality review directing Justice Kennedy's concurrence in *Harmelin*, that in turn guided the Court's analysis in *Ewing*, was "the primacy of the legislature." *Ewing*, 538 U.S. at 23, 123 S. Ct. at 1186 (quoting *Harmelin*, 501 U.S. at 1001).

> Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitu tion does not mandate adoption of any one penological theory. A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.

Id. at 1187 (citations omitted); *see id.* at 1189 (Any "criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme."); *Andrade*, 538 U.S. at 76, 123 S. Ct. at 1175 ("The governing legal principle gives legislatures broad discretion to fashion a sentence that fits within the scope of the proportionality principle. . . .").

The same respect for the legislative branch of government is as true of state courts as it is of federal courts. Thus we also give substantial deference to the legislature's authority to fix the punishment for a crime. *See State v.*

Wagstaff, 164 Ariz. 485, 490, 794 P.2d 118, 123 (1990) ("Defining crimes and fixing penalties are legislative, not judicial, functions."); *id.* at 492, 794 P.2d at 125 ("Proscribing conduct and determining appropriate sanctions for those who deviate from the accepted norms of conduct is purely a legislative function."); *State v. Mulalley*, 127 Ariz. 92, 97, 618 P.2d 586, 591 (1980) ("The judiciary . . . should not interfere in [the legislative] process unless a statute prescribes a penalty 'out of all proportion to the offense.'" (Quoting *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 930, 105 Cal. Rptr. 217 (1972)), *overruled on other grounds by State v. Noble*, 152 Ariz. 284, 731 P.2d 1228 (1987).[7]

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7. The exercise of judicial restraint in a case such as this is not, as the dissent would have, another judicial hearing when the trial court already has imposed the minimum and mitigated sentence passed by the legislature, but the deference to which the judicial branch owes the legislative and executive branches. Indeed, the propriety and constitutional necessity of this deference is well illustrated by the subjectivity of the dissent's careful few selections from memorandum decisions of this court of criminal cases, cases that even as presented do not have a sufficient context in which to evaluate the relationship among the criminal, the crime, the sentence and the myriad of other criminal cases decided by the courts of this state.

The correctness of deference also is illustrated by the *Eighth Amendment* opinions of the United States Supreme Court in *Ewing*, 538 U.S. 11, 123 S. Ct. 1179, 155 L. Ed. 2d 108, and *Andrade*, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144, in which cases the Court addressed the California "three strikes law" to the general effect that an individual who commits a third offense will be confined to prison for the rest of his life. After a criminal history largely comprised of theft and burglary, Ewing's third strike was the theft of three golf clubs. Andrade's third strike was two separate thefts of videotapes, five tapes worth $ 84.70 and four tapes worth $ 68.84.

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The Court in *Solem*, 463 U.S. at 292, enunciated three factors that it considered relevant to a determination whether a sentence is grossly disproportionate to the offense and therefore constitutes cruel and unusual punishment, factors that it reiterated in *Ewing*, 538 U.S. at 22, 123 S. Ct. at 1186, and that were utilized by the Arizona Supreme Court in *Davis*, 206 Ariz. at 381 P15, 79 P.3d at 68, and by this court in *State v. Long*, 207 Ariz. 140, 145 P25, 83 P.3d 618, 623 (App. 2004). The initial query is whether there is an inference that the sentence is grossly disproportionate to the severity of the offense. *Long*, 207 Ariz. at 146 P28, 83 P.3d at 624. If it is, we then compare the sentence with sentences for other offenses in Arizona (intra-jurisdictional analysis) and with the sentence imposed for the same crime in other states (inter-jurisdictional analysis). *Id.* at 147 P34, 83 P.3d at 625; *see also Harmelin*, 501 U.S. at 1005 (stating that reviewing courts should only consider the second and third factors "in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality").

To answer the initial query whether there is an inference of gross disproportionality between Berger's offenses and his sentences, we consider the facts of the case and the circumstances of the offender. *Long*, 207 Ariz. at 145-46 P27, 83 P.3d at 623-24, (citing *Davis*, 206 Ariz. at 384 P34, 79 P.3d at 71). Berger was a teacher, a husband and a father. He was neither immature nor of a subnormal level of intelligence unlike the defendants in *Davis*, 206 Ariz. at 377, 79 P.3d

64,[8] and *State v. Bartlett (Bartlett II)*[9], 171 Ariz. 302, 830 P.2d 823,[10] *cert. denied*, 506 U.S. 992, 121 L. Ed. 2d 445,

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8. The Arizona Supreme Court found that the sentence of imprisonment for fifty-two years without the possibility of parole or early release for Davis, a twenty-two year-old defendant, grossly disproportionate to the offenses, four counts of sexual misconduct with a minor, dangerous crimes against children. 206 Ariz. at 379-80 PP1, 7, 79 P.3d at 66-67. Davis' sexual misconduct involved having voluntary sexual intercourse with two post-pubescent teenage girls. *Id.* at 379 PP2-3, 79 P.3d at 66. In so finding, the court considered the following factors: lack of threatened or actual violence, the victims' willingness to participate in the sexual acts (even though they could not lawfully consent to the acts), lack of a criminal record, the fact that post-pubescent sexual conduct was not uncommon, Davis' lower intelligence and maturity level than that of other young adults, and the broad sweep of the laws that constitute dangerous crimes against children. *Id.* at 384-85 P36, 79 P.3d at 71-72.

9. We recognize that *Bartlett II* was overruled by *DePiano*, 187 Ariz. at 30, 926 P.2d 494, when the *DePiano* court determined "the initial threshold disproportionality analysis is to be measured by the nature of the offense generally and not specifically." However, the holding in *Bartlett II* was essentially reinstated when *Davis*, 206 Ariz. 377, 79 P.3d 64, effectively overruled *DePiano* on the same issue.

10. The Arizona Supreme Court found that the sentence of imprisonment for forty years without the possibility of parole or early release for Bartlett, a twenty-three year-old defendant, grossly disproportionate to the offenses, two counts of sexual conduct with a minor, dangerous crimes against children. 171 Ariz. at 303, 306, 311, 830 P.2d at 824, 827, 832. Bartlett's sexual misconduct involved having voluntary sexual intercourse with two post-pubescent teenage girls. *Id.* at 306, 830 P.2d at 827. In so finding, the court considered all of the same factors that it considered in *Davis*, 206 Ariz. at 384-

(Cont'd)

113 S. Ct. 511 (1992). He was not "caught in the very broad sweep" of the law against sexual exploitation. *Davis*, 206 Ariz. at 385 P36, 79 P.3d at 72. He was, rather, a prototypical offender.[11]

Berger claims that his sentence is disproportionate because he was convicted of possessing child pornography and not of producing or selling it. He adds that he did not financially support the child-pornography industry because there was no evidence that he made purchases.

The legislature has declared its intent that the "consumer of child pornography" be penalized as "severely" as those who produce the product. *See Taylor*, 160 Ariz. at 420, 773 P.2d at 979; A.R.S. § 13-3553. Berger downloaded images

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(Cont'd)

85 P36, 79 P.3d at 71-72, with the exception of the last factor, as well as Bartlett's lack of intent to physically or emotionally harm the girls, the evolution of the law and the sentencing standards at the time. *Id.* at 307-09, 830 P.2d at 828-30.

11. While the number of images that were found in Berger's house could not be quantified, the evidence was not disputed that Berger maintained files of images of child pornography at his house, some literal and some on his computer in a directory entitled "Mort's stuff" that itself included several subdirectories filled with graphic images of child pornography, photographs and video. In its motion to dismiss fifteen of the thirty-five counts of the indictment, the State gave as its reason its wish to spare the jury the sights of more disturbing images, and, in fact, Berger does not dispute the State's assertion on appeal that he had a "well-organized collection of thousands of photographs depicting children engaged in sexual activity."

from the internet, and, every time he visited a website, he demonstrated to the producers and sellers of child pornography that there was a demand for their product. Berger's demand served to drive the industry; there need not have been a direct monetary exchange. *See Osborne*, 495 U.S. at 109-10 ("It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand."); *Norris*, 159 F.3d at 930 ("There is no sense in distinguishing . . . between the producers and the consumers of child pornography. Neither could exist without the other."); *Ketcham*, 80 F.3d at 793 (making criminal possession of child pornography "discourages its production by depriving would-be producers of a market."); *Emond*, 163 Ariz. at 142, 786 P.2d at 993 ("Drying up the market *is* the only way to effectively combat the production of child pornography.").

Berger maintains also that, because his possession of the pornographic images was passive and because he did not use threats or violence in the commission of his crimes, his sentence is grossly disproportionate. This logic is abstruse. As was described by this court in *Hazlett*, 205 Ariz. at 527 P11, 73 P.3d at 1262, and as is evident from the violent pornographic images in this case, child pornography is a form of child abuse. Thus, by Berger's support of the child-pornography industry, he supported the subornation of the child(ren). This is in contrast with the voluntary sexual intercourse involved in *Davis* and *Bartlett II*.

Berger claims that, because the children depicted in the images are unaware that he is in possession of or viewing

their images, they are not further victimized after the image is taken. As stated above, that proposition is not true because the victimization of the child continues. "The materials produced are a permanent record of the children's participation and *the harm to the child is exacerbated by their circulation.*" *Norris*, 159 F.3d at 929 (quoting *Ferber*, 458 U.S. at 759).

Additionally, the possession of child pornography prompts the victimization of children other than those depicted. Berger, as a consumer of child pornography, provided an economic motive for its creation and continuation; absent such encouragement and enablement, these children would not have been abused as they were. *Id.* at 930; *see also Osborne*, 495 U.S. at 109-10. "The crime is the abuse of the children." *Hazlett*, 205 Ariz. at 527 P11, 73 P.3d at 1262 (footnote omitted).

Berger argues that, because he had no prior convictions or history of inappropriate sexual conduct involving children, his sentence is cruel and unusual since any legislative concern regarding recidivism is not pertinent. First, to the degree that recidivism was a legislative issue, it was but one concern. *See Ewing*, 538 U.S. at 25, 123 S. Ct. at 1187 (multiple justifications for sentence).

Second, Berger does not have a criminal history because his offenses were not discovered earlier. Berger was storing files depicting graphic images of child pornography as early as 1996, and he does not protest the State's contention that, when discovered, he possessed thousands of images of child pornography. *See State v. Zimmer*, 178 Ariz. 407, 410, 874

P.2d 964, 967 (App. 1993), *cert. denied*, 540 U.S. 1165, 157 L. Ed. 2d 1212, 124 S. Ct. 1179 (2004) (comparing Zimmer's case to *Bartlett II* and finding that, although Zimmer lacked a criminal history, "he admitted numerous prior episodes of nonconsensual touching involving others as well as this victim[]").

Berger also argues that the mandatory consecutive nature of his sentences renders the cumulative punishment grossly disproportionate. The compulsory nature of a sentence does not make it disproportionate per se, particularly when the trial court has discretion to impose the mitigated end of a scale, *see State v. Jonas*, 164 Ariz. 242, 249, 792 P.2d 705, 712 (1990),[12] and the Supreme Court has "never invalidated a penalty mandated by a legislature based only on the length of sentence[.]" *Harmelin*, 501 U.S. at 1006-07; *see State v. Jackson*, 186 Ariz. 490, 491, 924 P.2d 494, 495 (App. 1996) ("Whether mandatory prison sentences are not appropriate in every situation is a question for the law-making body, not the courts.") (Quoting *State v. Molina*, 118 Ariz. 250, 251, 575 P.2d 1276, 1277 (App. 1978)); *Zimmer*, 178 Ariz. at 409, 874 P.2d at 966 (citing *Harmelin*, 501 U.S. 957, 115 L. Ed. 2d 836, 111 S. Ct. 2680, for proposition that "mandatory sentencing statutes are not *per se* violative of the *eighth amendment*[]"). Furthermore, as the court wrote in *Davis*, we usually do not consider the imposition of consecutive sentences when determining proportionality. 206 Ariz. at 387 P47, 79 P.3d at 74 ("This court normally will not consider the imposition of consecutive sentences in a proportionality inquiry[.]"); *see United States v. Parker*, 241 F.3d 1114, 1117

12. Nothing in the *Davis* opinion changes this aspect of the analysis in *Jonas* contrary to the suggestion of the dissent.

(9th Cir. 2001) (sentence within statutory limits commonly upheld upon *Eighth Amendment* challenge)..

Unlike the defendant in *Davis*, nothing in Berger's case "cries out for departure from that general rule." 206 Ariz. at 387 P47, 79 P.3d at 74 ("Although this court normally will not consider the imposition of consecutive sentences in a proportionality inquiry, this case cries out for departure from that general rule."). The evidence in *Davis* that the punishment was "so severe as to shock the conscience of society[]" was overwhelming, *id.* at 388 P49, 79 P.3d at 75, whereas in Berger's case it is not. In *Davis*, the State recommended mitigated sentences, the probation officer who prepared the pre-sentence report stated that the mandatory sentences were not warranted and even the victims' mothers did not want Davis to be sentenced to a long prison term. *Id.* at 380 P9, 79 P.3d at 67. Also, when the jurors learned of the minimum sentences, "all twelve jurors submitted a note to the trial judge stating their belief that 'the punishment for the crime is excessive.' Two jurors submitted individual letters expressing their dismay and strong belief that the potential sentences for Davis were too harsh." *Id.* Further, upon sentencing, the trial judge entered an order allowing Davis to apply for executive clemency within ninety days of sentencing. *Id.* at 380 P10, 79 P.3d at 67.

In marked contrast to Davis' case, in Berger's case, the State recommended presumptive sentences at a minimum, and the author of the pre-sentence report did not recommend the minimum sentences but, rather, that Berger "be sentenced to less than the presumptive term for all twenty counts." The trial judge received but one post-trial letter from an

anonymous juror expressing concern with the possible sentence. While the experienced judge sentenced Berger to minimum sentences, she also recognized that "the legislature has made it very clear that this is an extremely serious crime," giving her opinion without apparent reservation that the applicable sentencing range of consecutive sentences from ten to twenty-four years each was not so grossly disproportionate as to suggest to her that it was cruel and unusual punishment.[13] In this regard, she did not propose — as she could have — a special order allowing Berger to seek executive clemency. A.R.S. § 13-603(L) (Supp. 2004). This is not a case with the same if any "shock" to societal conscience as was *Davis*.[14]

Considering all of the facts and circumstances, and given our deference to the legislature's decisions regarding what behavior to make criminal and the appropriate punishment, there is no inference of gross disproportionality in Berger's sentence. There is, accordingly, no need for intra- and inter-

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13. Of course, any conclusion about a constitutional viola tion is a matter of law that is decided de novo by this court, making the trial court's determination legally irrelevant.

14. The dissent mentions that Berger ostensibly has some compulsion from childhood to collect sets of images. First, the images that are the subject of his convictions are not mere "photographic images"; Berger possessed child pornography. Second, the risk-assessment report in which this impulse is mentioned is not a part of the record, suggesting that its genesis made it inappropriate to include for sentencing purposes because, were it not, either the experienced trial counsel or the experienced trial judge or the author of the pre-sentence report could — and one of them undoubtedly would — have asked that it be made a part of the record.

jurisdictional analyses. *Long*, 207 Ariz. at 147 P34, 83 P.3d at 625; *see Davis*, 206 Ariz. at 385 P38 n.6, 79 P.3d at 72. The federal and state constitutional prohibitions against cruel and unusual punishment have not been violated in this case.

C. Invocation of A.R.S. § 13-4037

Berger asks us to exercise the authority of A.R.S. § 13-4037(B) (2001)[15] to reduce his sentence by making the twenty ten- year consecutive terms concurrent. Alternatively, he requests that we remand this case to the trial court with instructions that it sentence him to a prison term of one to ten years for each of the twenty counts.

An appellate court must exercise its authority under this statutory provision with great caution, *State v. Fillmore*, 187 Ariz. 174, 185, 927 P.2d 1303, 1314 (App. 1996), and a trial court's sentence within statutory limits ordinarily will be upheld absent an abuse of its discretion, *Long*, 207 Ariz. at 147 P37, 83 P.3d at 625, although in *Davis*, the court converted Davis' crimes from dangerous crimes against

15. Section 13-4037(B) provides:

> Upon an appeal from the judgment or from the sentence on the ground that it is excessive, the court shall have the power to reduce the extent or duration of the punishment imposed, if, in its opinion, the conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted. In such a case, the supreme court shall impose any legal sentence, not more severe than that originally imposed, which in its opinion is proper. Such sentence shall be enforced by the court from which the appeal was taken.

children to non-dangerous offenses without an express finding that the trial court had abused its discretion. 206 Ariz. at 387-88 PP47-48, 79 P.3d at 74-75. In light of this authority, we apply the following rule: Absent a trial court's abuse of discretion or the imposition of an unlawful sentence, we will not reduce a sentence unless such a reduction is warranted by such extraordinary circumstances as to make the sentence inconsistent with statutory intent. *See State v. Levitt*, 155 Ariz. 446, 448, 747 P.2d 607, 609 (App. 1987) (power to modify sentence will be exercised only in extraordinary circumstances).[16] Such extraordinary circumstances do not exist in Berger's case, certainly not so much as to thwart the execution of the legislature's judgment. We therefore decline to exercise our authority to reduce Berger's sentences or to remand this case to the trial court with instructions to enter lesser sentences.

CONCLUSION

Berger's convictions and sentences are affirmed.

SUSAN A. EHRLICH, Judge

CONCUR BY: DONN KESSLER (In Part)

16. Although the trial court relied upon the analysis in *DePiano*, 187 Ariz. at 30-31, 926 P.2d at 496-97, which subsequently was overruled in *Davis*, 206 Ariz. at 384 P34, 79 P.3d at 71, the court could not have given Berger less than the sentences that it imposed, consecutive mitigated prison terms of ten years without early release or pardon. Even had it held the opinion that the cumulative sentence constituted cruel and unusual punishment, this court, when confronted with the issue, would have reviewed it de novo as a matter of law.

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CONCUR: KESSLER, J., concurring in part and dissenting in part

I concur with the majority's analysis concerning equal protection and A.R.S. § 13-4037(B) (2001). I respectfully dissent from the majority's conclusions as to cruel and unusual punishment.

This case is not about whether possession of child pornography is a serious crime deserving of severe punishment. It is beyond peradventure that the legislature has the authority to impose severe penalties for this type of crime.

Rather, the issue is whether parties should be given a fair opportunity to present specific evidence to permit a trial court to apply the correct legal standard under *State v. Davis*, 206 Ariz. 377, 79 P.3d 64 (2003), and determine whether a mandatory sentence is cruel and unusual punishment. For the reasons stated below, Morton Berger ("Berger") did not receive that opportunity. I would remand this matter for an evidentiary hearing to allow the trial court to determine whether, on the facts of this case, it is cruel and unusual punishment for a statute to *require* a court to sentence Berger to at least 200 years in prison without any chance of release or parole for possessing twenty images of child pornography downloaded from the Internet.

In many cases, the facts developed at trial and at an aggravation and mitigation hearing would be sufficient to allow a trial court and an appellate court to determine whether mandatory, minimum consecutive sentences were so extreme based on the individual facts of that case that, like *Davis*,

such sentencing would constitute cruel and unusual punishment. Berger was not given a fair opportunity to develop that factual record and the trial court could not consider such evidence because of a confluence of two events. First, the trial court determined the constitutionality of the mandatory sentencing scheme under a now-erroneous legal standard before *Davis* was decided. Accordingly, it held it could *not* consider individual factors about this case and this defendant to determine whether the mandatory 200-year minimum sentence was cruel and unusual punishment.

Second, as a result of that ruling, it was fruitless for Berger to attempt to develop any factual record at sentencing. This is because such a record, under the now-erroneous standard used by the trial court, could not have been considered to determine the cruel and unusual punishment issue. Regardless of any such evidence, the statutory scheme *required* the trial court to sentence Berger to minimum, mandatory consecutive sentences totaling 200 years in prison without chance of parole or probation, making any mitigation hearing an exercise in futility.

Berger should at least have the opportunity to present evidence which might show that requiring him to live the rest of his life in prison amounts to cruel and unusual punishment. A remand would give Berger and the State an opportunity to present evidence relevant to the cruel and unusual punishment issue, give the trial court an opportunity to apply *Davis* and provide a complete factual record on the cruel and unusual punishment issue.

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As I wrote in *State v. Hazlett* when this Court upheld the constitutionality of Arizona's basic child pornography law (A.R.S. § 13-3553 (Supp. 2003)), this Court was not addressing the constitutionality of the severity of the statutory punishments for pos session of child pornography. 205 Ariz. 523, 529 n.11, 73 P.3d 1258, 1265 n.11 (App. 2003). As a matter of judicial restraint, we need not and should not reach that constitutional issue today because of the procedural setting of this case. We should not decide the constitutional issue without first allowing the parties to present sufficient facts and allowing the trial court to make sufficient factual findings. *See State v. Buhman*, 181 Ariz. 52, 54, 887 P.2d 582, 584 (App. 1994) (appellate court will not determine constitutional issue when record lacks necessary fact finding by trial court). *Compare State v. Dillon*, 34 Cal. 3d 441, 668 P.2d 697, 700, 194 Cal. Rptr. 390 (Cal. 1983) (appellate court can determine whether punishment is grossly disproportionate and modify it on appeal when disproportionality is manifest on the record). Appellate courts generally have the trial court conduct adequate fact-finding hearings to determine whether a sentence is excessive. *State v. Ramos*, 133 Ariz. 4, 7, 648 P.2d 119, 122 (1982). Accordingly, I would not reach out to decide the constitutional issue today, but would remand for further proceedings in the trial court to apply *Davis*.

Appendix B

I. Proceedings Below

In February 2003, the trial court denied Berger's contention that the statutory sentencing scheme was cruel and unusual. The trial court properly relied on *State v. DePiano*, 187 Ariz. 27, 926 P.2d 494 (1996), the law as it then existed, and concluded it could not analyze the constitutional argument based on the particular facts of this crime and this particular offender without violating *DePiano*:

> However, the Supreme Court [in *DePiano*] clearly stated[:]
>
> "But we disapprove of that part of *Bartlett II* that concludes that Justice Kennedy's analysis would require an examination of the facts and circumstances of the particular crime and the particular offender. We agree with the minority in *Bartlett II* that the initial threshold disproportionality analysis is to be measured by the nature of the offense generally and not specifically.["] [187 Ariz. at 30, 926 P.2d at 497.]
>
> In the instant case, defendant Berger asks this Court to look at the specific facts of his case and to determine that the sentence he would be facing [a minimum of 200 years without chance of parole] is cruel and unusual punishment. Such an analysis would be in direct violation of the Arizona Supreme Court's decision in *DePiano*. Based on the above analysis, therefore, this Court will use Justice Kennedy's method of analysis and

look at the nature of the offense generally, not specifically.

In applying the *DePiano* standard, the trial court held that generally the sentencing range from ten to twenty-four years under A.R.S. § 13-604.01 (Supp. 2003) for violation of A.R.S. § 13-3553 was not so grossly disproportionate as to require it to find cruel and unusual punishment. Nor, it held, did consecutive sentencing per se amount to cruel and unusual punishment, citing *State v. Jonas*, 164 Ariz. 242, 245, 792 P.2d 705, 708 (1990).

II. Effect of State v. Davis

While this case was pending on appeal, the Arizona Supreme Court decided *Davis*. It overturned a crucial aspect of *DePiano* by requiring an analysis of gross disproportionality of the sentence based on the specific facts in the case. Importantly, it also explained that mandatory consecutive sentences can amount to cruel and unusual punishment when the length of the sentence is so extreme, given those individual factors, that the sentence shocks society's conscience. We are bound to follow the law as articulated by our supreme court as it exists now, even though *Davis* was decided after the trial court's decision. *Arnold v. Knettle*, 10 Ariz. App. 509, 511, 460 P.2d 45, 47 (1969). *Cf. Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974) (appellate court must follow law in effect at time it renders its decision unless it would result in manifest injustice or there is a statutory directive otherwise).

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As the *Davis* court explained, a three-part test for cruel and unusual punishment still applies,[17] but the first element - an inference of gross disproportionality - must be based on the *specific facts* as to the nature of the crimes, the defendant and his conduct. 206 Ariz. at 383-84 PP31-34, 79 P.3d at 70-71. Underpinning the *Davis* approach is the concept that, while a legislature can substantially limit a judge's sentencing discretion by requiring mandatory consecutive sentences, such a limitation is unconstitutional in those rare cases in which the mandatory minimum sentence is so extreme as to shock society's conscience. *Id.* at 387-88 P47, 79 P.3d at 74-75. As the Davis court explained, it is the combination of mandatory and consecutive sentences which may render the sentence so extreme given the individual facts as to shock society's conscience. *Davis*, 206 Ariz. at 387-88 P47, 79 P.3d at 74-75.

III. The Need for An Evidentiary Hearing to Apply Davis

The question then becomes whether, like *Davis*, the mandatory minimum consecutive sentence of 200 years without chance of parole "cries out" for departure from the general rule. While the majority concludes that it does not, I conclude that we cannot make that determination without a more complete factual record. As explained below, this insufficient factual development is of no small matter. The trial court should have the opportunity to consider specific

17. The three part test is whether there is an inference of gross disproportionality, and, if so, whether intra - and inter-jurisdictional analyses validate that inference. *Davis*, 206 Ariz. at 385 P38, 79 P.3d at 72.

facts and decide under *Davis* whether such a mandatory minimum sentence *on the facts of this case* constitutes cruel and unusual punishment.

First Davis Factor:
Inference of Gross Disproportionality

In *Davis*, the supreme court stated that the analysis of an inference of gross disproportionality has to be based on the facts of the individual case, the individual offender, and the offender's risk to society. *Davis*, 206 Ariz. at 383-84 PP31-34, 79 P.3d at 70-71. *Accord State v. Bartlett*, 171 Ariz. 302, 306-08, 830 P.2d 823, 827-29 (1992) (court should look to harm caused or threatened to the victim or society and the culpability of the offender, including the absence of any violence and lack of criminal record).[18] This view is consistent with courts in other jurisdictions, which also look to these factors as well as a defendant's potential to contribute to society. *Dillon*, 668 P.2d at 720 (in determining gross disproportionality, court will look to both nature of offense and/or the offender, with particular regard to the degree of danger present to society); *In re Lynch*, 8 Cal. 3d 410, 503 P.2d 921, 939-40, 105 Cal. Rptr. 217 (Cal. 1972) (indeterminate life maximum sentence for second offense of indecent exposure cruel and unusual given, in part,

18. *DePiano* disapproved *Bartlett*, deciding that courts could not examine the individual facts of any case to determine gross disproportionality as applied to that case. *DePiano*, 187 Ariz. at 30, 926 P.2d at 497. However, our supreme court in *Davis* disapproved of *DePiano* on that point, resurrecting the principles addressed in *Bartlett*. *State v. Long*, 207 Ariz. 140, 145 P25, 83 P.3d 618, 623 (App. 2004).

defendant's superior intellect and great potential); *Wilson v. State*, 830 So. 2d 765, 778 (Ala. 2001) (first prong of disproportionality test includes factors such as circumstances of the crime, harm caused to victim or society, culpability of offender and offender's motive in committing the crime).

The need for adequate factual development to apply *Davis* is highlighted by Justice McGregor's explanation that determining gross disproportionality necessarily involves fact-finding, a process that is best left to the trial court. *Davis*, 206 Ariz. at 393 P79, 79 P.3d at 80 (McGregor, J., dissenting in part). In most cases, as in *Davis*, the record of the trial and any mitigation/aggravation hearing should suffice to present evidence on these factors. In cases like this one, however, when the now-erroneous *DePiano* standard made meaningless any presentation and consideration of many of the facts relevant to determining gross disproportionality, further fact-finding is needed.

As the Supreme Court stated in *Davis*, there are a number of factors which a court can examine to determine if there is an inference of gross disproportionality. 206 Ariz. at 384-85 P36, 79 P.3d at 71-72. Nothing in *Davis* implies that list is exclusive. As shown by the following chart, some of the same undisputed factors utilized in *Davis* support a finding that the 200-year mandatory minimum sentence here is cruel and unusual, while some of those factors do not support such a conclusion.

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Davis

Convicted of four charges of sexual conduct with a minor, thirteen years minimum sentence each, no chance of parole, to be served consecutively

1. Defendant did not commit the crimes with any violence.

1. There is no evidence Berger committed any violent acts.

2. No prior record.

3. Post-pubescent conduct of victims common and may have encouraged crime. 3. Victims' "conduct" in no way makes them culpable.[19]

4. Defendant had below average intelligence or maturity.

5. Caught in broad sweep of statute.

6. Trial judge, jurors, presentence report and prosecutor all favored minimum sentence, the lower court issued special clemency order.

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19. Thus, application of *Davis* here lacks what Justice Mc Gregor characterized as the "most disquieting feature" of *Davis* - comparing the relative culpability of the victims and the defendant. 206 Ariz. at 392-93 PP76-78, 79 P.3d at 79-80 (McGregor, J., dissenting).

Appendix B

Berger

Convicted of twenty counts of possession of child pornography (sexual exploitation of a minor), ten years minimum sentence each, no chance of parole, to be served consecutively

4. Defendant was a high school teacher.

5. Caught in broad sweep of statute - violation of A.R.S. § 13-3553 involves not only the possession of child pornography but also the distribution and making of such material, aggravated assault, molestation, child abuse, and kidnapping. Under A.R.S. § 13-604.01(D), same mandatory minimum and consecutive sentences apply.

6. One juror thought sentence would be excessive. Trial judge ordered minimum mandatory sentence. No clemency order requested or ordered and presentence report did not find sentencing range excessive.

The trial court never had the opportunity to weigh these factors under *Davis*. More importantly, the need for fact-finding here is underscored by the lack of any evidentiary hearing regarding several other factors. First, both in the trial court and on appeal, the State attempted to portray Berger as a constant consumer of child pornography as purportedly reflected by his allegedly having thousands of "hits" on his computer for child pornography or allegedly having thousands of illegal images in his possession. The record does not support that Berger possessed thousands of illegal

images or thousands of "hits". Nor was there evidence of how many times Berger searched the Internet for pornography[20] or how many sites he visited. Other than the twenty images he was convicted of, there is no evidence of how many images of actual child pornography he possessed.[21] This is not to minimize either the repulsive nature of the images he did possess or their numbers. The number and nature of the possessed images are only two factors bearing on whether twenty, ten-year mandatory consecutive sentences without chance for release constitutes cruel and unusual punishment.

Second, remanding for an evidentiary hearing relating to gross disproportionality would allow the court *for the first time* to explore both Berger's risk and potential of contributing to society. *Dillon*, 668 P.3d at 720-21; *Lynch*, 503 P.2d at 939-40. At the time of its ruling on the constitutional issue,

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20. This fact is relevant because our Supreme Court has stated that consecutive sentencing might be inappropriate when forbidden images were obtained at one time and were simply copied and not photographed by the defendant. *State v. Taylor*, 160 Ariz. 415, 420, 773 P.2d 974, 979 (1989).

21. The State initially charged Berger with possession of thirty-five forbidden images, but voluntarily agreed to dismiss fifteen of those counts. The State's evidence about "thousands" of "hits" or "images" referred to a computer-driven process creating "fragments" for each website which had a certain word in its description. Those fragments did not reflect how many times Berger searched the Internet, how many sites he visited or how many images he had. Thus, when the jury asked the trial court how many images were found in Berger's house, even the prosecutor agreed that question "can't" be answered.

the trial cou as not even aware of a risk assessment - evidence that relevant to determine whether a sentence may be grossly disproportionate. *Long*, 207 Ariz. at 146 P30, 83 P.3d at 624. The assessment was mentioned only in passing during the sentencing hearing. The specific contents of that assessment were never presented to the trial court.

That assessment, albeit without a chance for the State to rebut it, presents what is purported to be an expert opinion that Berger was a productive member of society (an award-winning teacher) with no prior criminal record, that he acted out of a collection compulsion and that he posed no risk of repeating his conduct or of acting out toward children.

The majority correctly points out that the assessment was not part of the record on appeal and was only filed with this Court at the Court's request. However, I am not relying on the risk assessment itself to conclude the sentence was cruel and unusual punishment. Rather, the point I am making is that if there had been an effective evidentiary hearing to apply the *Davis* factors, the evidence in the assessment could have been introduced and the trial court might have found the mandatory 200-year sentence was cruel and unusual punishment.

An evidentiary hearing would allow the trial court to apply *Davis* in light of these and other factors such as the number of images, the circumstances surrounding the crime including the motive, the absence of any evidence he ever purchased any of the images, the manner in which it was committed and the consequences of the Berger's conduct as well as his age, prior record, risk to society, potential to contribute to society, and personal characteristics and state

of mind. *Bartlett*, 171 Ariz. at 306-08, 830 P.2d at 827-29 (court should consider circumstances of crime including any nonviolent nature as well as lack of any prior record); *Dillon*, 668 P.2d at 720-22; *Lynch*, 503 P.2d at 939-40. In making any such determination, not only should the punishment fit the crime, but it should fit the criminal. *Dillon*, 668 P.2d at 721 (quoting *Lynch*, 503 P.3d at 921).

This lack of a complete record is crucial to determining cruel and unusual punishment. One of the purposes of *Davis* is to isolate those cases in which the sentence would truly shock the conscience of the community. 206 Ariz. at 388 P39, 79 P.3d at 75. The mandatory nature of the minimum 200-year sentence here contrasts with the fact that our sentencing statutes have authorized much more lenient sentences for direct crimes of violence, including:

> • Placing a defendant on probation without any imprisonment for killing another after the defendant was found guilty of leaving the scene of a fatal accident;[22]
>
> • Imposing 9.5 years' imprisonment upon a driver who cut a young girl in half with his car while she crossed the street after the defendant was found guilty of negligent homicide and leaving the scene of a fatal accident which he did not cause;[23] and

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22. *State v. O'Brien*, CR 2003-016197 (Maricopa County Superior Court, Minute Entry of March 26, 2004).

23. *State v. Torre*, 1 CA-CV 03-0029 (Ariz. App. Dec. 26, 2003) (mem. decision).

> • Imposing concurrent sentences amounting to no more than twenty years for second degree murder, three aggravated assault counts and three endangerment counts after the defendant went on a shooting spree killing one person and injuring several others.[24]

This is not to say that the sentences in those other cases were too lenient because they are based on the facts of each case. Rather, the fact that the statutes give judges discretion in those cases to impose such sentences based on extenuating circumstances despite the nature of such crimes highlights the fact that the statute here prohibits such discretion and requires mandatory, flat consecutive sentences regardless of any extenuating circumstances.

The majority seeks to avoid any such remand and fact-finding in several ways. First, like the trial court, the majority cites to *Jonas*, 164 Ariz. at 245, 792 P.2d at 708, decided before *Davis*, for the principle that mandatory consecutive sentences do not constitute per se cruel and unusual punishment. By doing so, the majority implies that even if the mandatory minimum sentences were lower, either those sentences still would have to be served consecutively or we can only look at the separate sentences for each image, not the totality of the required sentence. The majority also cites to *Davis* for the proposition that consecutive sentencing is normally not considered in determining disproportionality.

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24. *State v. Garnica*, 1 CA-CR 02-0832 (Ariz. App., Sept. 28, 2004) (mem. decision).

However, that conclusion takes the language from *Davis* out of context. The core issue here is that for each image Berger possessed, the trial judge was statutorily required to impose a minimum ten-year sentence to be served consecutively, thus requiring a 200-year minimum sentence. As our Supreme Court explained in *Davis*, while normally a court will not consider consecutive sentences as part of a proportionality review, it is *exactly* the combination of minimum mandatory sentences and mandatory consecutive sentencing which can create the inference of gross disproportionality:

> Although this court normally will not consider the imposition of consecutive sentences in a proportionality inquiry, this case cries out for departure from that general rle. . . . *It is in part because judges in Arizona have no discretion regarding the minimum sentence and must impose consecutive sentences that this sentence fails the proportionality test. . . . Therefore, to ignore the requirement that the sentences be served consecutively would be to ignore one of the causes of the disproportionality.* We recognize the legislature's right to impose a thirteen-year minimum sentence . . . and to require that the sentences be served completely. We also recognize the legislature's right to require consecutive sentences for this type of offense. *We cannot, however, uphold a sentence that becomes unconstitutionally disproportionate to the crimes committed because the sentences are mandatorily lengthy, flat, and consecutive.*

Davis, 206 Ariz. at 387-88 P47, 79 P.3d at 74-75. (Emphasis added.)

Again, there is no issue that Berger was deserving of punishment for this crime. The issue is whether, before requiring Berger to die in prison, the parties and the trial court should have the opportunity to develop and consider evidence about the nature of the crime and of Berger's risk to society before determining whether a mandatory 200-year consecutive sentence without chance of parole may be so grossly disproportionate to the specific facts as to render such a requirement unconstitutional. If so, a court may impose a different sentence pursuant to A.R.S. §§ 13-702, -702.01 and -702.02 (2001), which is not necessarily flat or consecutive. *Davis*, 206 Ariz. at 387 P48, 79 P.3d at 75.

Second, the majority contends that the record shows that, unlike *Davis*, there is no overwhelming evidence to show an inference of gross disproportionality or that a mandatory 200-year sentence would shock society's conscience, characterizing Berger as a prototypical offender. The majority does not cite any authority that only overwhelming evidence can prove an inference of gross disproportionality. Clearly Berger was not an innocent user of the Internet who accidentally downloaded prohibited images. However, the characterization of Berger as a prototypical offender is not based on any standard or definition. As noted above, the record does not show that Berger possessed "thousands" of illegal images or his computer had "thousands" of hits. Even though Berger had numerous images, there is still an insufficient record to help us because there was no evidentiary

hearing to determine these and other factors relevant to a finding of cruel and unusual punishment.[25] Moreover, there was an insufficient opportunity for Berger to put on such a record.

Finally, the majority contends that the experienced trial judge held the applicable sentencing range was not such as to suggest that it was cruel and unusual punishment. In fact, the trial court determined that the sentencing range was not cruel and unusual punishment under *DePiano*, which prohibited it from considering whether the required consecutive terms were unconstitutional under the facts of a particular case. That is exactly why a remand for an evidentiary hearing to apply *Davis* to the facts of this case and this defendant is needed.

By concluding that no further evidentiary hearings are needed, the majority seems to imply that absolutely no set of facts could ever lead to an inference that effectively sentencing Berger to die in prison for possession of twenty images from the Internet is cruel and unusual punishment. Although there may be cases in which the defendant has been given an opportunity to present evidence as to the *Davis* factors and a remand is not needed, this is not one of those

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25. The majority asserts that every time Berger visited a website containing prohibited images or downloaded such images, he "demonstrated to the producers and sellers of child pornography that there was a demand for their product." However, there was no evidence he purchased any of the images or that any websites he visited kept track of how many persons visited the website. These factors could be explored at an evidentiary hearing on remand.

cases. As a matter of judicial restraint, I prefer to allow parties to present facts in light of *Davis* and to permit the trial court to make a full determination of whether the statutorily-required penalty here shocks the conscience.

Second Davis Factor:
Intra-Jurisdictional Comparison

The majority limits its analysis of cruel and unusual punishment to the first part of the *Davis* test. Despite its importance, turning to the second and third parts may help us validate any concern we have about gross disproportionality. *Davis*, 206 Ariz. at 385 P38 and n.6, 79 P.3d at 72 and n.6 (second two parts of intra- and inter-jurisdictional analysis are not required "but we agree with the Supreme Court's suggestion that such an inquiry might validate the court's initial impression of gross disproportionality.").

An intra-jurisdictional comparison shows that possession of child pornography is punished either more severely or similarly to crimes involving more direct physical injuries to the victims. For example, the *Davis* court pointed out that second-degree murder, sexual assault, and continuous sexual abuse against a child under fifteen would receive the same presumptive sentence as in that (and this) case. 206 Ariz. at 385-86 P39, 79 P.3d at 72-73. Additionally, persons accused of kidnapping, child abuse, and aggravated assault would be eligible for a ten-year minimum sentence per count. *Id.* Therefore, the crimes compared in *Davis* are "seemingly more dangerous crimes than Davis' [and certainly more dangerous

than Berger's, yet] carry a lesser presumptive sentence" and can be mitigated to a lesser minimum sentence than the ten-year minimum sentence per count here. *Davis*, 206 Ariz. at 385-86 P39, 79 P.3d at 72-73.

The State compares the sentencing here to crimes involving violence directly upon a victim. For example, attempted first-degree murder of a child under twelve results in a life sentence with possible parole after thirty-five years. Yet possession of two forbidden images results in a greater punishment: a mandatory, flat, minimum sentence of forty years without chance of parole.

Third Davis Factor:
Inter-Jurisdictional Comparison

Berger has provided us with a survey of all fifty states demonstrating that Arizona has the highest possible sentencing range in the entire United States for possession of child pornography. The fact that other states punish child pornography possession less severely than Arizona does not make Arizona's sentencing scheme unconstitutional. The separation of powers doctrine ensures that our legislature is free to require severe sentences for this type of crime. However, this type of comparison can validate an inference that the mandatory minimum consecutive sentencing scheme is so grossly disproportionate to the facts in a specific case as to be cruel and unusual punishment.

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Our independent review of those statutes shows that: (1) three states do not criminalize possession of child pornography;[26] (2) seven states treat it as a misdemeanor or have a maximum sentence of twelve months;[27] (3) twenty-one states have a maximum sentence of eight years with probation eligibility;[28] (4) eight states have a maximum sentence of ten years with eight of those allowing for probation;[29] (5) two states have a maximum sentence of fifteen years, but allow for probation;[30] (6) three states have a maximum sentence of twenty years but allow for probation;[31] and (7) one state has a maximum sentence of five years with the provision that possession of each image constitutes a separate offense.[32] While we do not know from those statutes whether any of those states require consecutive

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26. Hawaii, Nebraska and Ohio.

27. California, Colorado, Iowa, Kentucky, Maine, Maryland and North Dakota.

28. Delaware, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Virginia, Vermont, Washington, West Virginia and Wisconsin.

29. Alabama, Alaska, Arkansas, Louisiana, Montana, South Carolina, South Dakota and Texas.

30. Idaho and Utah.

31. Connecticut, Georgia and Mississippi.

32. Florida.

sentences per image, we do know that at least one state (Connecticut) breaks down the prison sentence by the number of images possessed, making it a class B felony for possession of fifty or more images, a class C felony for twenty-fifty images and a class D felony for less than twenty images.

IV. Conclusion

While Berger was convicted of a crime abhorred by society and deserving of punishment, he still should be given an opportunity to present evidence that sentencing him to spend the rest of his life in prison when he may pose no further risk to society is so cruel and unusual as to shock society's conscience. We cannot tell from the current record whether effectively sentencing Berger to die in prison for possessing twenty forbidden images, taken from the Internet, amounts to cruel and unusual punishment. Given the penalty in this case, fundamental fairness requires that Berger and the State have an opportunity to present evidence on this issue and the trial court have an opportunity to consider whether the specific facts might render the statutorily mandated sentence cruel and unusual.

It is very possible that at such a hearing, Berger will not develop sufficient facts to show that the sentence in this case is grossly disproportionate to the crimes involved and to the nature of the defendant. However, he should be given one fair opportunity to make his case before having to spend the rest of his life in prison. I would remand this matter to the

trial court for hearings on the underlying facts in light of *Davis*.[33]

DONN KESSLER, Presiding Judge

DISSENT BY: DONN KESSLER (In Part)

33. Such a factual inquiry could also lead the trial court to consider entering a special order allowing Berger to petition the Board of Executive Clemency for a commutation of sentence, an order which was not requested before. *See* A.R.S. § 13-603(L) (Supp. 2002) (allowing such an order if the judge believes "that a sentence that the law requires the court to impose is clearly excessive.").

APPENDIX C — RELEVANT STATUTE

Arizona Revised Statute § 13-604.01, "Dangerous crimes against children," provides:

> **A.** A person who is at least eighteen years of age and who stands convicted of a dangerous crime against children in the first degree involving sexual assault of a minor who is twelve years of age or younger or sexual conduct with a minor who is twelve years of age or younger shall be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by section 31-233, subsection A or B until the person has served thirty-five years or the sentence is commuted. This subsection does not apply to masturbatory contact.
>
> **B.** Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving attempted first degree murder of a minor who is under twelve years of age or second degree murder of a minor who is under twelve years of age or sexual assault of a minor who is under twelve years of age or sexual conduct with a minor who is under twelve years of age may be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by 31-233, subsection A or B until the person has served thirty-five years or the sentence

is commuted. If a life sentence is not imposed pursuant to this subsection, the person shall be sentenced to a presumptive term of imprisonment for twenty years.

C. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving attempted first degree murder of a minor who is twelve, thirteen or fourteen years of age, second degree murder of a minor who is twelve, thirteen or fourteen years of age, sexual assault of a minor who is twelve, thirteen or fourteen years of age, taking a child for the purpose of prostitution, child prostitution, sexual conduct with a minor who is twelve, thirteen or fourteen years of age, continuous sexual abuse of a child or, involving or using minors in drug offenses shall be sentenced to a presumptive term of imprisonment for twenty years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for thirty years.

D. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the first degree involving aggravated assault, molestation of a child, commercial sexual exploitation of a minor, sexual exploitation of a minor, child abuse or

kidnapping (sic) shall be sentenced to a presumptive term of imprisonment for seventeen years. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for twenty-eight years.

E. Except as otherwise provided in this section, a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children involving sexual abuse under 13-1404 is guilty of a class 3 felony and shall be sentenced to a presumptive term of imprisonment for five years, and unless the person has previously been convicted of a predicate felony, the presumptive term may be increased or decreased by up to two and one-half years pursuant to 13-702, subsections C, D and E. If the person is sentenced to a term of imprisonment the person is not eligible for release from confinement on any basis except as specifically authorized by 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to 41-1604.07 or the sentence is commuted. If the convicted person has been previously convicted of one predicate felony the person shall be sentenced to a presumptive term of imprisonment for fifteen years and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by 31-233, subsection A or B until the sentence imposed by the court has been

served, the person is eligible for release pursuant to 41-1604.07 or the sentence is commuted.

F. The presumptive sentences prescribed in subsections B, C and D of this section or subsection E of this section if the person has previously been convicted of a predicate felony may be increased or decreased by up to seven years pursuant to the provisions of 13-702, subsections B, C and D.

G. Except as provided in subsection E of this section, a person sentenced for a dangerous crime against children in the first degree pursuant to this section is not eligible for suspension of sentence, probation, pardon, or release from confinement on any basis except as specifically authorized by 31-233, subsection A or B until the sentence imposed by the court has been served or commuted.

H. A person who stands convicted of any dangerous crime against children in the first degree pursuant to subsection C or D of this section having been previously convicted of two or more predicate felonies shall be sentenced to life imprisonment and is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by 31-233, subsection A or B until the person has served not fewer than thirty-five years or the sentence is commuted.

Appendix C

I. Notwithstanding chapter 10 of this title,[1] a person who is at least eighteen years of age or who has been tried as an adult and who stands convicted of a dangerous crime against children in the second degree pursuant to subsection C or D of this section or luring a minor for sexual exploitation pursuant to 13-3554 is guilty of a class 3 felony and shall be sentenced to a presumptive term of imprisonment for ten years. The presumptive term may be increased or decreased by up to five years pursuant to 13-702, subsections B, C and D. If the person is sentenced to a term of imprisonment the person is not eligible for release from confinement on any basis except as specifically authorized by 31-233, subsection A or B until the person has served the sentence imposed by the court, the person is eligible for release pursuant to 41-1604.07 or the sentence is commuted. A person who is convicted of any dangerous crime against children in the second degree having been previously convicted of one or more predicate felonies is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by 31-233, subsection A or B until the sentence imposed by the court has been served, the person is eligible for release pursuant to 41-1604.07 or the sentence is commuted.

J. Section 13-604, subsections M and O apply to the determination of prior convictions.

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1. Section 13-1001 et seq.

Appendix C

K. The sentence imposed on a person by the court for a dangerous crime against children under subsection D of this section involving child molestation or sexual abuse pursuant to subsection E of this section may be served concurrently with other sentences if the offense involved only one victim. The sentence imposed on a person for any other dangerous crime against children in the first or second degree shall be consecutive to any other sentence imposed on the person at any time, including child molestation and sexual abuse of the same victim.

L. In this section:

1. "Dangerous crime against children" means any of the following that is committed against a minor who is under fifteen years of age:

(a) Second degree murder.

(b) Aggravated assault resulting in serious physical injury or involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument.

(c) Sexual assault.

(d) Molestation of a child.

(e) Sexual conduct with a minor.

(f) Commercial sexual exploitation of a minor.

(g) Sexual exploitation of a minor.

(h) Child abuse as prescribed in 13-3623, subsection A, paragraph 1.

(i) Kidnapping.

(j) Sexual abuse.

(k) Taking a child for the purpose of prostitution as defined in 13-3206.

(l) Child prostitution as defined in 13-3212.

(m) Involving or using minors in drug offenses.

(n) Continuous sexual abuse of a child.

(o) Attempted first degree murder.

A dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense, except attempted first degree murder is a dangerous crime against children in the first degree.

2. "Predicate felony" means any felony involving child abuse pursuant to 13-3623, subsection A, paragraph 1, a sexual offense,

conduct involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument, or a dangerous crime against children in the first or second degree.

Ariz. Rev. Stat. Ann. § 13-604.01 (2002 Supp.).

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No. 06-349

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

MORTON ROBERT BERGER,

Petitioner,

VS.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari for the Arizona Supreme Court

BRIEF FOR THE STATE OF ARIZONA IN OPPOSITION

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QUESTION PRESENTED

Whether the Eighth Amendment's Cruel and Unusual Punishment Clause's threshold gross-disproportionality analysis mandates consideration of the aggregate length of a defendant's consecutive prison terms, when each component prison term imposed, standing alone, is constitutional?

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OPINIONS BELOW

The Arizona Supreme Court's opinion (Pet. App. 1a-41a) is reported at 134 P.3d 378 (Ariz. 2006). The Arizona Court of Appeals' opinion (Pet. App. 42a-85a) is reported at 103 P.3d 298 (Ariz. App. 2004).

STATEMENT OF JURISDICTION

The Arizona Supreme Court entered its judgment on May 10, 2006. Pet. App. 1a. Petitioner did not file a petition for rehearing. The petition for a writ of certiorari was filed on September 7, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and United States Constitution Article III, Section 2.

STATEMENT OF THE CASE

On June 6, 2002, law enforcement conducted a knock-and-talk at Petitioner's residence because a Dallas-based internet child-pornography website operator had identified him as someone who had provided his credit card number to purchase access to their website's contraband images. (P.I. at 13 [State's Response to Petitioner's Release Motion], page 4; R.T. 1/28/03, at 6-8; R.T. 1/29/03, at 26, 37-40, 46, 51-53, 55.) Ultimately, Petitioner admitted that he had downloaded images of child pornography on his web-site at home, resulting in the seizure of two computers, 150 floppy disks, 100 compact disks, and three photo-album binders that contained thousands of pornographic images of prepubescent children that Petitioner had printed onto high-quality, glossy paper, and which he carefully organized by age, sexual activity, and sexual partners. (P.I. at 28 [State's Response to Petitioner's Motion to Dismiss Allegation of A.R.S. § 13-604.01], page 8; R.T. 1/29/03, at 37-41, 55-66, 72-75, 77, 83-85, 89-100, 104-05, 112-13, 143-45;

Trial Exhibits 1, 2, 5-7.) While scanning the images on Petitioner's hard drive and disks, the State's forensic computer expert tabulated almost 41,000 "hits" for the words most commonly used to search child pornography on-line—"Lolita," "preteen," "young girls," and "underage"—a frequency rarely encountered during his investigations. (R.T. 1/29/03, at 162, 194.) Petitioner created his earliest images on April 23, 1996, more than 6 years before his arrest. (*Id.* at 177-80.) Petitioner admitted his awareness that possession of child pornography was illegal. (*Id.* at 72-75, 85-89, 166-67; Trial Exhibit 3.)

As reflected in the State's response to Petitioner's motion for release, Petitioner's child-pornography collection was extensive, graphic, and extremely disturbing:

> The images included bondage, torture, and young girls having intercourse with dogs. Children are blindfolded, hands tied, being urinated on, and wearing dog collars. There are numerous video files, most involving girls as young as 3 years old being forced to perform oral sex on adult men and being vaginally and anally raped by adults. There is a particularly disturbing video of a young (no more than 4 years old) girl struggling and crying and begging her abuser to stop as he holds her by the throat and ejaculates on her face and forces his penis into her mouth. . . .
>
> Almost all of his thousands of images were of children engaged in sexual acts, not just exploitative exhibition. On a more disturbing note, this defendant not only stored images of little children with blindfolds and hands tied, being raped, tortured, forced to have sexual intercourse with dogs and other animals, wearing dog collars and being urinated on—but he even printed them in high quality glossy paper and neatly stored

> them in binders so that he could look at them more easily. He has photos of children engaged in sexual acts with other young children as well as with adults sexually abusing them. The children in defendant's images are extremely young, including toddlers. Many of the videos contained on the defendant's hard drive and CD-ROMS are absolutely nauseating and too horrible to even describe. They are quite literally the worst images of child pornography/torture that the undersigned has seen in her career, an opinion also expressed by the State's very experienced expert pediatrician who determined the ages of the children and the experienced detective assigned to this case. One disturbing video actually has a loud audio file attached—a young girl no more than 4 years old, struggling and crying and begging her abuser to stop as he holds her by the throat and ejaculates on her face and forces his penis in her mouth.

(P.I. at 13 [State's Response to Petitioner's Release Motion], pages 3, 5.)

After charging Petitioner with thirty-five counts of sexual exploitation of a minor, the State dismissed fifteen counts before trial began because the prosecutor feared deluging the jury with these graphically disturbing images.[1] (R.T. 1/28/03, at 3-5; R.T. 3/7/03, at 4-6.) The jury subsequently convicted Petitioner of the remaining twenty counts and determined that the depicted children were less than fifteen years old. (R.T. 3/3/03, at 11-13.)

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[1] The State did not charge Petitioner with sexual exploitation of a child for every image in his collection, but selected only thirty-five representative images from the thousands available, for purposes of "judicial economy." (P.I. at 13 [State's Response to Petitioner's Release Motion], page 4.)

After rejecting Petitioner's post-conviction Eighth Amendment challenge, the trial court imposed twenty mitigated ten-year prison terms, and ordered them to run consecutive to each other, as mandated by A.R.S. §§ 13-604(K) and -3553. (R.T. 3/7/03, at 11-13; M.E. at 94, 97.) Although the trial court imposed mitigated prison terms, it agreed with the Legislature's determination that Petitioner's crimes were very serious offenses and did not enter any special order to invoke A.R.S. § 13-603(L)'s executive clemency provisions. (R.T. 3/7/03, at 11-14; M.E. at 97.)

On direct appeal, Petitioner challenged his convictions on First Amendment and Equal Protection grounds and also claimed that the aggregate length of his sentences violated the Eighth Amendment. The Arizona Court of Appeals rejected all of these arguments in a published opinion. Pet. App. at 42a-63a. Abandoning the aforementioned challenges to his convictions, Petitioner petitioned the Arizona Supreme Court solely to review the lower courts' rejection of his argument that the aggregate length of his twenty consecutive ten-year prison terms transgressed the Cruel and Unusual Punishment Clause of the Eighth Amendment. The Arizona Supreme Court granted review "to again consider the framework for reviewing Eighth Amendment challenges to lengthy prison sentences." Pet. App. at 4a. Writing for himself and all but one of the members of the Arizona Supreme Court, Justice Bales held that Petitioner's sentences did not raise an inference of gross disproportionality, affirmed his sentences, and vacated that portion of the Arizona Court of Appeals' opinion addressing Petitioner's Eighth Amendment claim. Pet. App. at 1a, 24a.

The Arizona Supreme Court commenced its analysis by observing that "[this Court] has noted that non-capital sentences are subject only to a 'narrow proportionality

principle' that prohibits sentences that are 'grossly disproportionate' to the crime." Pet. App. at 5a (quoting *Ewing v. California*, 538 U.S. 11, 20, 23 (2003) (O'Connor, J., concurring) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring)). The majority then identified its standard as "the framework outlined by Justice Kennedy in his concurring opinion in *Harmelin* and later employed by Justice O'Connor in announcing the judgment of the Court in *Ewing*." Pet. App. at 5a. Recognizing that "courts must accord substantial deference to the legislature and its policy judgments as reflected in statutorily mandated sentences," the Arizona Supreme Court enumerated "the primacy of the legislature in determining sentencing, the variety of legitimate penological schemes, the nature of the federal system, and the requirement that objective factors guide proportionality review" as the "several principles" that guide the threshold "gross-disproportionality" inquiry and inform "the broader notion that the Eighth Amendment 'does not require strict proportionality between crime and sentence' but instead forbids only extreme sentences that are 'grossly disproportionate to the crime.'" Pet. App. at 6a-7a (quoting *Ewing*, 538 U.S. at 23 (O'Connor, J., concurring) (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)).

The Arizona Supreme Court observed that this Court had most recently rejected a recidivist's Eighth Amendment challenge to a prison term of 25 years to life under California's "three strikes statute" because: (1) "the State of California had a 'reasonable basis' for believing the law would substantially advance the goals of incapacitating repeat offenders and deterring crime"; and (2) the statute "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." Pet. App. at 7a (quoting *Ewing*, 538 U.S. at 28, 30). In similar vein, the

majority observed that this Court previously rejected a challenge to a mandatory sentence of life imprisonment without parole for a first-time offender convicted of possessing 672 grams of cocaine in *Harmelin*, with Justice Kennedy observing "that the Michigan legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole." Pet. App. at 8a (quoting *Harmelin*, 501 U.S. at 1003-04 (Kennedy, J., concurring)). The Arizona Supreme Court thus concluded that its analysis of Petitioner's Eighth Amendment challenge would be "guided" by the following framework: "[a] prison sentence is not grossly disproportionate, and a court need not proceed beyond the threshold inquiry, if it arguably furthers the State's penological goals and thus reflects 'a rational legislative judgment, entitled to deference.'" Pet. App. at 9a (quoting *Ewing*, 538 U.S. at 30).

The Arizona Supreme Court recognized, "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling,'" and that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." Pet. App. at 9a (quoting *Osborne v. Ohio*, 495 U.S. 103, 109 (1990) (quoting *New York v. Ferber*, 458 U.S. 747, 756-58 (1982)). The majority likewise acknowledged that the victims of child pornography continue to suffer substantial harm long after the material's production. Pet. App. at 10a. The Arizona Supreme Court thus concluded that criminalizing the possession of child pornography is "tied directly to state efforts to deter its production and distribution 'at all levels in the distribution chain,'" encourages the destruction of these materials, and furthers the "goal of combating the sexual abuse and

exploitation inherent in child pornography." Pet. App. at 10a (quoting *Osborne*, 495 U.S. at 110).

Recounting the legislative history of Arizona's current child-pornography statutes, the Arizona Supreme Court observed that Arizona first banned child-pornography possession in 1983 with legislation that implicitly acknowledged "the fact that producers of child pornography exist due to the demand for such materials." Pet. App. at 11a. The court further noted that the Arizona Legislature subsequently included the offense of possession of child pornography among the "dangerous crimes against children" targeted in A.R.S. § 13-604.01—a statute which prescribes "lengthy periods of incarceration . . . intended to punish and deter" "those predators who pose a direct and continuing threat to the children of Arizona." Pet. App. at 11a-12a. The court thus concluded, "Given this history . . . the legislature had a 'reasonable basis for believing' that mandatory and lengthy prison sentences for the possession of child pornography would 'advance[] the goals of [Arizona's] criminal justice system in [a] substantial way.'" Pet. App. at 12a (quoting *Ewing*, 538 U.S. at 28; alterations in original).

The Arizona Supreme Court next compared the gravity of the offense against the severity of Petitioner's sentences. The majority observed that Petitioner did not dispute that child pornography, "a felony under federal and most state laws," is a "very serious" crime. Pet. App. at 13a. Rejecting Petitioner's contention that he had received a "200 year flat-time sentence upon his conviction of possession of child pornography," the Arizona Supreme Court concluded that Petitioner, like the defendant in *Ewing*, had "incorrectly frame[d] the issue at the threshold," observing that Petitioner had actually been "convicted of twenty separate counts of possession of child pornography involving minors under fifteen, and he was

sentenced to a ten-year term for each count . . . [to] be served consecutively." Pet. App. at 12a. The court reached this conclusion because each of Petitioner's twenty counts "was based on a different video or image, the images involved some fifteen different child victims, and [Petitioner] had accumulated the images over a 6-year period." Pet. App. at 13a.

The Arizona Supreme Court provided two additional reasons for focusing its gross-disproportionality analysis "on whether a ten-year sentence is disproportionate for a conviction of possessing child pornography involving children under fifteen." *Id.* First, "[a] defendant has no constitutional right to concurrent sentences for two separate crimes involving separate acts." *Id.* Second, "Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." Pet. App. at 14a (quoting *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988)). Consequently, the court concluded:

> Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in the aggregate. . . . This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences.

Pet. App. at 14.

Based upon this Court's Eighth Amendment jurisprudence and its own precedent, the Arizona Supreme Court concluded that Petitioner's ten-year prison term per count was *not* grossly disproportionate to his crime of child-pornography possession:

> The Supreme Court has affirmed a sentence of twenty-five years to life for the grand theft of three golf clubs worth nearly $1200 by a recidivist felon, *Ewing*, 538 U.S. at 30-32, 123 S.Ct. 1179; upheld a sentence of life in prison without parole for a first-time offender possessing 672 grams of cocaine, *Harmelin*, 501 U.S. at 996, 111 S.Ct. 2680; and found no Eighth Amendment violation in two consecutive twenty-year prison terms for possession of nine ounces of marijuana with intent to distribute, *Hutto v. Davis*, 454 U.S. 370, 374, 102 S.Ct. 703, 70 L.Ed.2d 556 (1982) (per curiam). Similarly, this court has upheld a sentence of twenty-five years without parole for a twenty-one-year-old defendant convicted of selling a $1 marijuana cigarette to a fourteen-year-old, even though this sentence was consecutive to a twenty-one-year sentence for the defendant's trafficking in stolen property with the same juvenile.

Pet. App. at 15a.

The Arizona Supreme Court observed that "only once in the past quarter century has [this Court] sustained an Eighth Amendment challenge to the length of a prison sentence." *Id.* (citing *Solem v. Helm*, 463 U.S. 277 (1983)). The court distinguished *Solem* from the instant case on two grounds: (1) in *Solem*, the defendant was sentenced to life imprisonment without parole, "the most severe punishment the State could have imposed," for the "quite minor crime" of uttering a no-account check, "one of the most passive felonies a person could commit," Pet. App. at 15a (quoting *Solem*, 463 U.S. at 296-97); and (2) *Solem* "did not involve a mandatory sentence, but instead concerned a judge's discretionary decision to impose the maximum authorized sentence [and] [t]hus . . . did not implicate the 'traditional deference' that courts must afford to

legislative policy choices when reviewing statutorily mandated sentences," Pet. App. at 16a.

Based upon the overwhelming evidence of Petitioner's large-scale, deliberate, and long-term acquisition of child pornography, the Arizona Supreme Court concluded, "[I]n the terminology of *Ewing*, [Petitioner's] sentences are 'amply supported' by evidence indicating his 'long, serious' pursuit of illegal depictions and are 'justified by the State's public-safety interest' in deterring the production and possession of child pornography." Pet. App. at 17a (quoting *Ewing*, 538 U.S. at 29-30). The aforementioned evidence likewise prompted the court to conclude that Petitioner's proscribed conduct fell within "the core, not the periphery, of the prohibitions of A.R.S. § 13-3553(A)(2)—the knowing possession of visual depictions of sexual conduct involving minors." Pet. App. at 20a. The Arizona Supreme Court therefore declined Petitioner's invitation to consider the cumulative effect of consecutive sentences imposed on him. Pet. App. at 19a.

Thus, given "the legislature's intent to deter and punish those who participate in the child pornography industry, and [Petitioner's] commission of twenty separate offenses," the court affirmed Petitioner's sentences without conducting inter- and intra-jurisdictional analyses, based upon its conclusion that "the twenty consecutive ten-year sentences are not grossly disproportionate to his crimes." Pet. App. at 24a.

Concurring "fully . . . in the analysis and result reached by the majority in this case," Justice Hurwitz nonetheless wrote separately to respond to Justice Berch's concurring and dissenting opinion, which suggested that Eighth Amendment analysis "would be easier if courts were allowed to conduct an intra- and inter-jurisdictional analysis at the outset in order to find an inference of gross disproportionality." Pet. App. at 25a-

26a. After acknowledging that *Harmelin* foreclosed such an approach, Justice Hurwitz proceeded to consider the penalties imposed for other crimes in Arizona and for the same offense in other jurisdictions and nonetheless concluded that such extended analyses failed to raise an inference of gross disproportionality. Pet. App. at 26a-27a. Addressing Justice Berch's "real concern . . . that Arizona law *requires* that a court impose consecutive ten-year sentences for each offense," Justice Hurwitz observed that this Court's Eighth Amendment jurisprudence: (1) "rejected the notion that mandatory flat sentences violate the Constitution because they do not allow consideration of the particular situation of the offender"; and (2) does not "allow . . . find[ing] consecutive sentences for separate crimes unconstitutional if the individual sentences for each crime are not." Pet. App. at 28a (emphasis in original).

Disagreeing with the majority's focus upon the specific sentence imposed for each count, Justice Berch issued a concurring and dissenting opinion wherein she maintained, "[I]n determining whether a total sentence is grossly disproportionate to the crime for which it was meted out as punishment, we must deal with the sentence imposed as a whole and not shield ourselves from the full impact of the sentence by analyzing only one charge and sentence." Pet. App. at 36a-37a. Despite concurring with the majority's "statements of the rules emanating from the *Harmelin* line of cases," Justice Berch "would find that a minimum mandatory sentence of 200 years for possession of twenty pornographic images raises an inference of gross disproportionality that requires additional analysis before ultimately the court determines whether the sentence is unconstitutionally disproportionate." Pet. App. at 41a.

ARGUMENT

Petitioner contends that the Arizona Supreme Court's Eighth Amendment analysis was defective because the majority failed to consider the aggregate length of his twenty statutorily mandated consecutive ten-year prison terms when comparing the gravity of his crimes against the severity of his sentences. Petitioner further argues that had the Arizona Supreme Court not focused its analysis on the constitutionality of the ten-year prison terms imposed for each count of possession of child pornography, the majority would have been compelled to find an inference of gross disproportionality, conduct both intra- and inter-jurisdictional comparative analyses, and thus conclude that his sentences violated the Eighth Amendment. However, the Arizona Supreme Court properly found each ten-year prison term constitutional and employed the proper standard to consider Petitioner's constitutional attack on the cumulative length of his consecutive sentences. The Arizona Supreme Court's opinion not only is faithful to the decisions of this Court, but also comports with well-established lower-court precedent governing Eighth Amendment challenges to the aggregate length of multiple prison terms, none of which individually constitute cruel and unusual punishment. Thus, further review is not warranted.

A. PETITIONER'S TEN-YEAR PRISON TERM PER COUNT IS CONSTITUTIONAL.

The Arizona Supreme Court correctly held that Petitioner's ten-year prison term per count of possession of child pornography did not raise an inference of gross disproportionality, for two reasons. First, the ten-year sentence imposed for this crime is less severe than other prison terms that this Court upheld as punishment for far less serious offenses. *See Lockyer v. Andrade*, 538 U.S. 63, 77 (2003)

(upholding two statutorily-mandated consecutive prison terms of 25 years to life for two counts of petty theft under California's recidivist statute); *E .ng*, 538 U.S. at 30-31 (upholding mandatory prison term of 25 years to life for California recidivist convicted of felony grand theft); *Harmelin*, 501 U.S. at 1005 (upholding mandatory life imprisonment without parole for a first-time offender who stood convicted of simple possession of 672 grams of cocaine); *Hutto*, 454 U.S. at 375 (upholding two consecutive 20-year prison terms imposed for selling 3 ounces of marijuana and possessing 6 ounces of marijuana for distribution); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (upholding life sentence, with parole eligibility, imposed upon a Texas recidivist whose three theft-related crimes involved money and property having an aggregate worth of $229.11).

Second, the Arizona Supreme Court properly held that the legislature "had a 'reasonable basis for believing' that mandatory and lengthy prison sentences for the possession of child pornography would 'advance[] the goals of [Arizona's] criminal justice system in [a] substantial way.'" Pet. App. at 12a (quoting *Ewing*, 538 U.S. at 28; alterations in original). Indeed, this Court previously found it "surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." *Osborne*, 495 U.S. at 109-10. Thus, the Arizona Legislature had a reasonable basis to believe that mandating severe prison terms for this crime would reduce the sexual abuse of children by significantly deterring and incapacitating child-pornography consumers. "Notably, both of these penological theories [deterrence and incapacitation] have been held by the Supreme Court to be valid and subject to deference by the courts." *United States v. Angelos*, 433 F.3d 738, 751 (10th Cir. 2006) (citing *Ewing*, 538 U.S. at 24-28, and *Harmelin*, 501 U.S. at 998-99).

Although Petitioner contends that Arizona's mandatory minimum sentence ranks as the Nation's harshest for his crime, "the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate." *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring); *see also Rummel*, 445 U.S. at 281 ("Even were we to assume that the statute employed against Rummel was the most stringent found in the 50 states, that severity would hardly render Rummel's punishment 'grossly disproportionate' to his offenses.").[2]

Because comparison of the gravity of Petitioner's crime to the severity of his ten-year prison term did not give rise to an inference of gross disproportionality, the Arizona Supreme Court properly rejected Petitioner's Eighth Amendment claim without conducting inter- and intra-jurisdictional analyses. *See Ewing*, 538 U.S. at 23-24, 30; *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

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[2] As Justice Hurwitz made clear in his concurring opinion, other jurisdictions prescribe penalties for child pornography possession that are at least as long as the ten-year prison term that Petitioner received for obtaining images of children under 15. Pet. App. at 27a (Hurtwitz, J., concurring). *See, e.g.*, 18 U.S.C. § 2252(a)(1), (b)(1) (2000) (sentencing range of 5 to 20 years' imprisonment); Ga. Code Ann. § 16-12-100 (2003) (5 to 20 years' imprisonment); Miss. Code Ann. § 97-5-35 (2005) (5 to 40 years' imprisonment); Nev. Rev. Stat. Ann. § 200.750 (2005) (life imprisonment with parole eligibility after 10 years); Utah Code Ann. §§ 76-5a-3, 76-2-203(2) (1953) (sentencing range of 1 to 15 years' imprisonment).

B. THE AGGREGATE LENGTH OF PETITIONER'S TWENTY CONSECUTIVE PRISON TERMS DOES NOT VIOLATE THE EIGHTH AMENDMENT BECAUSE EACH COMPONENT TEN-YEAR PRISON TERM IS CONSTITUTIONAL.

Despite the constitutionality of each ten-year prison term imposed, Petitioner maintains that this Court should issue a writ of certiorari because the Arizona Supreme Court refused "to consider the full impact of Arizona's mandatory flat, consecutive sentencing scheme." Petition, at 8. Although Petitioner contends that the correct yardstick for his Eighth Amendment claim is the aggregate length of his twenty prison terms, the Arizona Supreme Court correctly concluded, "[I]f the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence or because the consecutive sentences are lengthy in the aggregate." Pet. App. at 14a. In selecting this analytical framework for determining the constitutionality of the aggregate total of Petitioner's consecutive sentences, the court honored the well-established principle that "Eighth Amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *Id.* (quoting *Aiello*, 864 F.2d at 265).[3] This principle's ultimate source is *O'Neil v. Vermont*, 144 U.S. 323 (1892), wherein this Court—albeit in *dicta*—approved the Vermont Supreme Court's rationale for rejecting a defendant's "cruel and unusual

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[3] Numerous other federal and state courts follow this approach while reviewing Eighth Amendment challenges to consecutive prison sentences. *See United States v. Ming Hong*, 242 F.3d 528 532 (4th Cir. 2001); *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001); *Hawkins v. Hargett*, 200 F.3d 1279, 1285 (10th Cir. 1999); *People v. Hayes*, 923 P.2d 221, 229 (Colo. App. 1995); *People v. Elliott*, 112 N.E. 300, 304 (Ill. 1916); *Malee v. State*, 809 A.2d 1, 8-9 (Md. App. 2002); *People v. Kennebrew*, 560 N.W.2d 354, 358 (Mich. App. 1996); *State v. Venman*, 564 A.2d 574, 582 (Vt. 1989); *Wahleithner v. Thompson*, 143 P.3d 321, 323, ¶ 12 (Wash. App. 2006).

punishment" challenge to his cumulative sentences for 307 counts of selling intoxicating liquor—19,914 days of incarceration and fines totaling $6,638.72:

> If he has subjected himself to a severe penalty, it is simply because he has committed *a great many* such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a *single* offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed.

Id. at 331 (quoting *State v. O'Neil*, 2 A. 586, 593 (Vt. 1886)) (emphasis in original opinion).

Based upon the rationale set forth in *O'Neil*, numerous courts, including the Arizona Supreme Court in the instant case, have applied the following rule: "Consecutive sentences of imprisonment for conviction of separate offenses do not render a punishment cruel and unusual, where the penalty upon conviction of each offense is itself valid." *State v. Dillard*, 320 So.2d 116, 122 (La. 1975).[4] Moreover, this Court's

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[4] *See also United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004) (upholding statutorily-mandated consecutive sentences totaling over 71 years where none of the individual sentences was "intrinsically 'grossly disproportionate' to the crime"); *Walton v. Scott*, 445 S.W.2d 97, 99 (Ark. 1969) ("We can find in the constitution no yardstick enabling us to announce

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jurisprudence since *O'Neil* continues to reflect the view that a defendant should not be allowed to escape full punishment for multiple crimes, based upon the cumulative effect of otherwise constitutional sentences. *See Lockyer*, 538 U.S. at 74 n.1 (rejecting the dissent's characterization of Andrade's sentence "as punishment for the total amount he stole" because "California law specifically provides that *each* violation of Cal. Penal Code Ann. § 666 (West. Supp. 2002) triggers a separate

(Continued).

with confidence that the penalty is valid when one package is involved, that it is valid when 120 packages are involved, but that it is not valid when 894 packages are involved."); *Cole v. State*, 262 So.2d 902, 903 (Fla. App. 1972) ("The direction by the trial court for the sentences to be served consecutively did not operate to make the several lawful sentences constitute cruel or unusual punishment."); *Elliott*, 112 N.E. at 304 ("The statute prescribing a penalty for unlawful sales of liquor is valid, and the validity of the sentences is not affected by the fact that there were numerous violations and cumulative penalties."); *Kaylor v. State*, 400 A.2d 419, 422 (Md. App. 1979) ("However, it is settled law that consecutive sentences do not constitute cruel and unusual punishment where the length of each sentence is within the limits prescribed by statute."); *People v. Miles*, 559 N.W.2d 299, 301-02 (Mich. 1997) (approving the holding in *People v. Warner*, 476 N.W.2d 660 (Mich. App. 1991), that courts need not consider the cumulative length of consecutive sentences when each individual sentence is constitutional); *State v. Poole (Robert)*, 100 N.W. 647, 647-48 (Minn. 1904) (holding that the cumulative fines and incarceration imposed for multiple violations of game-protection statute would not constitute cruel and unusual punishment where each sentence was constitutional); *State v. Repp*, 603 S.W.2d 569, 571 (Mo. 1980) (holding that "where [a] defendant is convicted of separate offenses and the sentences imposed are within statutory limits, [the] consecutive effect of the sentences does not constitute cruel and unusual punishment"); *State v. Padilla*, 509 P.2d 1335, 1338 (N.M. 1973) ("[The defendant] also recognizes that the imposition of multiple valid sentences to run consecutively does not, as such, constitute cruel and unusual punishment as contemplated by the Eighth Amendment to the Constitution of the United States."). *Brinkley v. State*, 143 S.W. 1120, 1123 (Tenn. 1911) (upholding the imposition of additional fines and jail terms per each additional crime committed where the prescribed sentence for each violation was constitutional).

application of the three strikes law, if the different felony counts are 'not arising from the same set of operative facts'") (emphasis in original); *Badders v. United States*, 240 U.S. 391, 393-94 (1916) (holding that the imposition of seven $1,000 fines against a defendant convicted of seven counts of mail fraud presented "no ground for declaring the punishment unconstitutional").

Petitioner's challenge to the cumulative total of his individually constitutional prison terms is essentially a thinly-disguised claim that he is constitutionally entitled to concurrent sentences for multiple crimes—a right that would absurdly allow him to evade the full extent of punishment legislatively prescribed for his crimes. However, there exists "no constitutional right to receive concurrent sentences for two separate offenses." *Rosemond v. State*, 756 P.2d 1180, 1181 (Nev. 1988); *see also United States v. Candia*, 454 F.3d 468, 474 (5th Cir. 2006); *United States v. White*, 240 F.3d 127, 135 (2nd Cir. 2001); *State v. Jonas*, 792 P.2d 705, 712 (Ariz. 1990); *State v. Moliga*, 747 P.2d 81, 85 (Idaho App. 1987); *Bewley v. State*, 220 N.E.2d 612, 613 (Ind. 1966). Indeed, as the Connecticut Supreme Court observed, "It would be preposterous to hold that a person who commits a crime has a constitutional right to escape punishment for it." *State v. McNally*, 211 A.2d 162, 164 (Conn. 1965); *see also United States v. Schell*, 692 F.2d 672, 675 (10th Cir. 1982) ("The Eighth Amendment does not prohibit a state from punishing defendants for the crimes they commit; the amendment prohibits a sentence only if it is grossly disproportionate to the severity of the crime."); *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999) ("There is nothing cruel and unusual about punishing a person committing *two* crimes more severely than a person committing only one crime, which is the effect of consecutive sentencing.") (emphasis in original); *Malee*, 809 A.2d at 9 (upholding imposition of multiple consecutive

sentences as "preventing duly convicted offenders from escaping punishment of their criminal acts"); *State v. Murray*, 563 A.2d 488, 500 (N.J. App. 1990) (rejecting challenge to imposition of consecutive sentences because "there can be no free crimes in a system for which the punishment shall fit the crime.").

"Consecutive sentences are an appropriate mechanism for imposing a distinct punishment for each of two criminal acts." *United States v. Woods*, 440 F.3d 255, 260 (5th Cir. 2006); *see also United States v. Lustig*, 555 F.2d 751 753 (9th Cir. 1975); *Kaylor*, 400 A.2d at 423. "Mandating consecutive sentences is not an unreasonable method of attempting to deter a criminal, who has committed several offenses . . . from doing so again." *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004); *see also United States v. Angelos*, 433 F.3d 738, 751 (10th Cir. 2006) (upholding mandatory consecutive sentences to deter and incapacitate those who repeatedly commit serious felonies with firearms); *People v. Preciado*, 116 Cal.App.3d 409, 412, 172 Cal. Rptr. 107, 108-09 (1981) (upholding the mandatory imposition of consecutive sentences for multiple violent rapes because the defendant's resulting punishment was "directly proportionate to the number and violence of his crimes").

The fact that Petitioner's twenty consecutive prison terms cumulatively exceed his life expectancy does not render them unconstitutional. As the Sixth Circuit correctly observed, "The Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment." *Beverly*, 369 F.3d at 537; *see also United States v. Khan*, 461 F.3d 477, 495 (4th Cir. 2006) (same); *Angelos*, 433 F.3d at 753 (same); *United States v. Yousef*, 327 F.3d 56, 163 (2d Cir. 2003) ("Lengthy prison sentences, even those that exceed any conceivable life

expectancy of a convicted defendant, do not violate the Eighth Amendment's prohibition against cruel and unusual punishment when based on a proper application of the Sentencing Guidelines or statutorily mandated prison terms.") (collecting cases); *Thompson v. State*, 658 S.W.2d 350, 270 (Ark. 1983) ("We have previously stated that the cumulative effect of consecutive sentences does not make punishment cruel and unusual."); *State v. Laffey*, 600 N.W.2d 57, 61 (Iowa 1999) ("The fact that these sentences mean that Laffey spends the remainder of his life in prison is not a factor in our analysis."); *State v. Nunn*, 802 P.2d 547, 551 (Kan. 1990) ("The fact that the minimum sentence imposed by a trial court exceeds the life expectancy of the defendant has never been grounds, *per se*, for a finding that the sentence is oppressive.").

The *mandatory* consecutive nature of Petitioner's twenty prison terms likewise causes no constitutional insult. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin*, 501 U.S. at 994-95. The Eighth Amendment does not prohibit the imposition of *one mandatory* life sentence as punishment for *one* serious crime. *Id.* at 993-96, 1008-09. Likewise, the Eighth Amendment does not prohibit the imposition of *twenty mandatory* consecutive prison terms as punishment for *twenty* serious crimes, notwithstanding the fact that their cumulative length exceeds Petitioner's anticipated life expectancy. *See, e.g., Lockyer*, 538 U.S. at 68, 77 (upholding two statutorily-mandated consecutive prison terms of 25 years to life); *United States v. Hungerford*, 465 F.3d 1113, 1118 (9th Cir. 2006) (consecutive sentences totaling 159 years); *Angelos*, 433 F.3d at 750-53 (consecutive sentences totaling 80 years); *Beverly*, 369 F.3d at 536-37 (consecutive sentences totaling 71.5 years); *United States v. Arrington*, 159 F.3d 1069, 1073 (7th Cir. 1998)

(total of 65 years); *State v. Taylor*, 773 P.2d 974, 981 (Ari 1989) (85 consecutive sentences totaling 2,975 years).[5]

Petitioner offers several alternative arguments to circumvent the effect of the aforementioned authorities. Seeking to recast his *twenty* prison terms as a *single* 200-year sentence, Petitioner cites *Weems v. United States*, 217 U.S. 349 (1910), for the proposition that "this Court has held that it is appropriate for courts to review an entire sentence to determine if it is grossly disproportionate to the crime." Petition, at 11. However, *Weems* is inapposite, for three reasons. First, whereas the defendant in *Weems* challenged the constitutionality of the *one* sentence he received for *one* count of falsification of an official document, Petitioner attacks *twenty* separate sentences

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[5] Petitioner complains that his mandatory consecutive sentences violate the Eighth Amendment because they exceed his life span and fails to offer him an opportunity to rehabilitate. Petition, at 18. This argument is of no moment because this Court previously upheld a sentence of life imprisonment without parole imposed upon a defendant who also had no prior convictions. *See Harmelin*, 501 U.S. at 994, 1002-09. Moreover, "the Eighth Amendment does not mandate adoption of any one penological theory." *Id.* at 999 (Kennedy J., concurring); *see also Ewing*, 538 U.S. at 25 ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. . . . Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts."); *cf. Deal v. United States*, 508 U.S. 129, 137 (1993) (refusing to apply rule of lenity to defendant who received six prison sentences totaling 105 years, based upon six armed robberies, where the defendant "managed to evade detection, prosecution, and conviction for the first five offenses and was ultimately tried for all six in a single proceeding"). Moreover, Petitioner's claim that he had no opportunity to rehabilitate is rebutted by the fact that he had amassed a large collection of child pornography over the 6-year period preceding his arrest. "He could have realized he had made a gross mistake and have reformed himself after committing his first offense." *People v. Poole (Terry)*, 555 N.W.2d 485, 492 (Mich. App. 1996).

that were imposed for *twenty* counts of sexual exploitation of a child. Second, while Petitioner is merely challenging the *length* of his prison terms, Weems challenged his "entire sentence," which included incarceration for fifteen years *and* non-severable statutory "accessories," such as "hard and painful labor," permanent shackling of the wrists and ankles, and lifetime surveillance. 217 U.S. at 357-59, 381-82; *see also Harmelin*, 501 U.S. at 990 (describing Weems' sentence). Third, the misplaced nature of Petitioner's reliance on *Weems* is manifested by the refusal of numerous courts to treat as one sentence the multiple sanctions that a defendant received as punishment for multiple offenses. *See, e.g., Ming Hong*, 242 F.3d at 532; *Pearson*, 237 F.3d at 886; *Malee*, 809 A.2d at 8-10; *Warner*, 476 N.W.2d at 660.

Petitioner further suggests that his prison terms should be viewed as a single 200-year sentence because his twenty counts of conviction allegedly arose from the same continuing act. (Petition, at 11-12.) Petitioner analogizes his case to *State ex rel. Garvey v. Whitaker*, 19 So. 457 (La. 1896),[6] wherein the

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[6] Petitioner claims that Justice Scalia cited the sentence in *Garvey* as an example of cruel and unusual punishment in *Harmelin*. (Petition, at 11, citing *Harmelin*, 501 U.S. at 985, n.10.) This assertion is false. Justice Scalia cited to *Garvey* in a footnote to his observation, "In the 19th century, judicial agreement that a 'cruel and unusual' (or 'cruel or unusual') provision did not constitute a proportionality requirement appears to have been universal." 501 U.S. at 984. Justice Scalia's footnote asserted that neither *Garvey* nor *State v. Driver*, 78 N.C. 423 (1878), "is to the contrary," because these two cases were "examples of applying, not a proportionality principle, but rather the principle . . . that a punishment is 'cruel and unusual' if it is illegal because not sanctioned by common law or statute." *Id.* at 984 n.10. Justice Scalia's "fair reading" of *Garvey* was "that the sentence was cruel and unusual because it was illegal." *Id.* In contrast to *Garvey*, the Arizona Supreme Court did *not* find the imposition of consecutive sentences in Petitioner's case to be illegal because Petitioner had acquired the visual images constituting the (Continued)

Louisiana Supreme Court invalidated multiple sentences of confinement for 2,160 days, based upon 72 consecutive thirty-day prison terms imposed for 72 distinct violations of a trespassing ordinance occurring over a temporally contiguous period of 1 hour and 40 minutes, with "each offense embracing only one and one-half minutes and one offense following after the other immediately and consecutively." Petition, at 12 (quoting *Garvey*, 19 So. at 459). *Garvey* does not apply to this case because Petitioner's crimes were *not* one continuous offense. The Arizona Supreme Court specifically found that: (1) Petitioner "had accumulated the images over a six-year period," Pet. App. at 13a; (2) Petitioner "had obtained at least two images in 1996, some six years before his arrest," Pet. App. at 17a; and (3) the evidence indicated that "from 1996 to 2002, [Petitioner] had downloaded computer files containing child pornography" and "created both computer and hard copy filing systems to maintain his collection," Pet. App. at 3a. The Arizona Supreme Court's factual findings effectively rendered moot the question whether a person could be convicted and sentenced for multiple images acquired simultaneously. Pet. App. at 13a, 25a n.6.

Finally, Petitioner adopts Justice Berch's dissenting view that the Arizona Supreme Court imprudently ignored "the nature of this offense, that possessors of child pornography possess more than one image and for more than one day," when it resolved his challenge to the cumulative length of his twenty ten-year prison terms by focusing on the sentence imposed for each count. Petition, at 12-13, 18. The essence of both Justice Berch and Petitioner's complaint is that the Arizona Legislature unwisely enacted a sentencing scheme that mandates a separate

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basis for his twenty counts and consecutive sentences at different times during the course of six years. Pet. App. at 13a, 17a, 25a n.6.

prison term for each individual visual image possessed, and that "the nature of the offense" should have instead prompted the legislature to impose a single prison term for possession of some unspecified number of *multiple* images. However, fixing the number of contraband images that may be punished within a single prison term is a subjective, policy determination that this Court has found to rest "properly within the province of legislatures, not courts." *Rummel*, 445 U.S. at 275-76 (rejecting defendant's challenge to the small amount of stolen money required to trigger application of Texas' recidivist statute); *see also Jonas*, 792 P.2d at 711 ("However, it is not the function of this court to engage in determining what minimum amount of marijuana need be involved in a 'serious' offense; that line-drawing function is properly one for the legislature."). As this Court previously observed, "This criticism is appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme." *Ewing*, 538 U.S. at 28.

Petitioner's criticism of Arizona's sentencing scheme also erroneously overlooks the three goals that motivated the Arizona Legislature to impose a separate penalty for each visual image: (1) decreasing the number of children sexually abused during the production of these materials by reducing demand through deterrence; (2) depriving molesters of a tool of seduction by encouraging destruction of their child-pornography collections; and (3) punishing violators for the separate injury inflicted by each image's existence. Pet. App. at 11a-12a (citing 1978 Ariz. Sess. Laws 1978, Ch. 200, § 2(A)(5)-(6)); *see also Osborne*, 495 U.S. at 110-11; *Ferber*, 458 U.S. at 759; *United States v. Hersh*, 297 F.3d 1233, 1242 (11th Cir. 2002); *United States v. Sherman*, 268 F.3d 539, 545 (7th Cir. 2001); *United States v. Norris*, 159 F.3d 926, 931 (5th Cir. 1998); *State v. Emond*, 786 P.2d 989, 990-93 (Ariz. App. 1990); *Perry v. Commonwealth*, 780 N.E.2d 53, 57 n.5 (Mass.

2002). Moreover, the Arizona Legislature's policy decision to mandate a consecutive prison term for each one of a defendant's contraband images is constitutional because this sentencing scheme rationally advances the legitimate objective of punishing more harshly those persons whose demand for child pornography most fueled the industry of sexually exploiting children. *See, e.g., Beverly*, 369 F.3d at 537 (upholding the mandatory imposition of consecutive prison terms as serving "the twin goals of retribution and deterrence"); *Preciado*, 116 Cal.App.3d at 412, 172 Cal.Rptr. at 108 ("By requiring a full, separate, and consecutive term for each rape, [the penal statute] attempts to provide increased punishment in cases of greater culpability based upon injury to the victims and society.") (citation omitted); *August*, 740 N.W.2d at 744 (upholding the imposition of consecutive sentences as a proper method of graduating punishment according to number of crimes committed); *Poole (Robert)*, 100 N.W. at 648 ("This method of fitting the punishment to the crime by graduating the penalty according to the number of animals, birds, or fish unlawfully killed, taken, or possessed has been adopted by the statutes of many of our sister states, and sustained as a proper exercise of legislative discretion.").[7]

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[7] Petitioner argues that the Arizona Supreme Court improperly rejected his request for an evidentiary hearing, at which he intended to present mitigating evidence to establish the disproportionate nature of his mandatory consecutive sentences. Pet. App. at 22a-23a. However, this Court has consistently rejected the notion of "individualized sentencing" in non-capital cases. *See Harmelin*, 501 U.S. at 996 ("We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further."); *id.* at 1006 ("The Court demonstrates that our Eighth Amendment capital decisions reject any requirement of individualized sentencing in non-capital cases.") (Kennedy, J., concurring).

C. THE ARIZONA SUPREME COURT PROPERLY CONSTRUED *LOCKYER*.

Finally, Petitioner contends that this Court should grant further review because the Arizona Supreme Court allegedly misconstrued *Lockyer* "as prohibiting courts from considering the consecutive nature of a sentence in an Eighth Amendment challenge." Petition, at 10. However, Petitioner misreads the import of the Arizona Supreme Court's majority opinion's citations to *Lockyer* in the instant case. The challenged passage, in its entirety, reads as follows:

> "Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988). Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate. *See Jonas*, 164 Ariz. at 249, 792 P.2d at 712. This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences. *See, e.g., Lockyer*, 538 U.S. at 74 n. 1, 123 S.Ct. 1166 (rejecting, in context of federal habeas review, dissent's argument that two consecutive sentences of twenty-five years to life for separate offenses were equivalent; for purposes of Eighth Amendment analysis, to one sentence of life without parole for thirty-seven-year-old defendant); *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004); *Taylor*, 160 Ariz. at 422, 773 P.2d at 981.

Pet. App. at 14a.

Nowhere in this passage does the majority state its belief that *Lockyer* absolutely *precludes* consideration of the aggregate length of Petitioner's prison terms. Instead, the court merely cited *Lockyer*, *Beverly*, and *Taylor* as three illustrative cases demonstrating that consecutive sentences do not become unconstitutional "merely because" "a defendant faces a total sentence exceeding a normal life expectancy as a result." Pet. App. at 14a.

The paragraph and footnote immediately preceding the passage quoted above further demonstrate Petitioner's misconstruction of the majority's citation to *Lockyer*. Therein, the Arizona Supreme Court explicitly reaffirmed *State v. Davis*, 79 P.3d 64 (2003), which held that the specific facts and circumstances of an extraordinary case *could* call for a proportionality analysis that includes consideration of the cumulative length of a defendant's consecutive prison terms. Pet. App. at 13a n.3, 18a-20a. Simply stated, the Arizona Supreme Court would have been forced to *overrule Davis* if—as Petitioner mistakenly contends—the majority had actually construed *Lockyer* as absolutely prohibiting consideration of the aggregate length of his consecutive sentences in its proportionality analysis.[8]

Consequently, the Arizona Supreme Court did not misconstrue *Lockyer* when it rejected Petitioner's Eighth Amendment challenge to his consecutive prison sentences.

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[8] Indeed, the Arizona Supreme Court repeatedly cited *Lockyer* in *Davis*. 79 P.3d at 68, 70, 74, ¶¶ 13, 29-31, 47 n.10. This fact constitutes additional proof that the majority in the instant case did *not* construe *Lockyer* in the manner Petitioner now contends.

CONCLUSION

For these reasons, the State respectfully requests that this Court deny Petitioner's petition for writ of certiorari.

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No. 06-349

IN THE

Supreme Court of the United States

MORTON BERGER,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

REPLY BRIEF

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Petitioner, who has no prior criminal record, has been convicted and sentenced to imprisonment for 200 years, with no possibility of parole or early release, for possessing twenty child pornographic images. No evidence was presented that petitioner made, distributed or purchased the images, nor was there any suggestion that he had ever had improper contact with a child.[1] The trial judge was required to impose this extraordinary 200-year sentence on a first offender because Arizona statutes (1) make possession of each pornographic image a separate felony offense; (2) require a minimum sentence of imprisonment for 10 years, without possibility of parole or early release for each of those possession offenses; and (3) require all of those 10-year mandatory minimum prison sentences be served consecutively.[2]

Petitioner challenges his sentence as a violation of the Eighth Amendment under the gross-disproportionality analysis employed by this Court in *Harmelin v. Michigan*, 501 U.S. at 1005 (Kennedy, J., concurring), and *Ewing v. California*, 538 U.S. 11 (2003). The Petition does not challenge Arizona's 10-year mandatory minimum sentence for possession of child pornography. It does challenge the mandatory 200-year sentence that results from the combination of the Arizona legislative requirements that possession of each image be treated as a separate offense and that sentences for each of these offenses be served consecutively. The Arizona Supreme Court has held those two legislative requirements to be completely irrelevant for Eighth Amendment purposes. It has held instead, that *Harmelin's* disproportionality analysis applies only to each

1. While the evidence showed Petitioner had thousands of images of pornography, the record does not show how many images were child pornography. App. B 74a

2. In addition to producing grossly disproportionate punishments, this legislative scheme invites abuses of prosecutorial discretion, or, at minimum, wildly disparate sentences.

of the separate 10-year sentences that comprise Petitioners' 200-year punishment, as if one 10-year sentence were the only punishment that has been imposed upon him. This Petition asks the Court to review this bizarre interpretation of the Eighth Amendment.

The Brief in Opposition misstates the question presented by the Petition. Petitioner does not, as respondent asserts, claim "that he is constitutionally entitled to concurrent sentences for multiple crimes." Brief in Opp., p. 18. Petitioner specifically does *not* question a State's ability to impose consecutive sentences for separate – even closely related separate – multiple crimes. Petitioner's contention is that when consecutive sentences *are* imposed as punishment for multiple, but closely-related offenses, the Eighth Amendment is to be applied to the punishment actually imposed, not to one-twentieth of that punishment. This contention is supported by common sense, as well as the plain text of the Amendment.

The Petition also does not, as the State suggests, advocate an Eighth Amendment approach that could permit multiple-crime defendants to "evade the full extent of punishment legislatively prescribed" for their crimes, Brief in Opp., p. 18. On the contrary, Petitioner contends only that the entire legislatively prescribed punishment be subjected to Eighth Amendment analysis. To uphold the decision below makes the legislature's determination to require each image be treated as a separate crime, and its determination that consecutive mandatory minimum sentences be imposed for each of these crimes, completely immune from Eighth Amendment scrutiny, both on its face and as applied. That result obviously conflicts with the Eighth Amendment's command that grossly disproportionate punishments not be inflicted.

The genesis of this Court's proportionality principle was, like the present case, a case concerning consecutive sentences for multiple closely-related crimes. *See O'Neil v. Vermont*, 144 U.S. 323 (1892).[3] Justice Kennedy's opinion in *Harmelin*, 501 U.S. at 997, adopted the proportionality principle first described in the dissent in *O'Neil*, (and later adopted by the Court in *Weems v. United States)*, that the Eighth Amendment prohibition of cruel and unusual punishments is a prohibition of "all punishments which by their excessive length or severity are greatly disproportioned to the *offenses* charged." 217 U.S. 349, 371 (1910), quoting *O'Neil*, 144 U.S. at 340 (Field, J., dissenting) (emphasis added). In language that bears directly on the issue in this case, Justice Field then added:

> It is no matter that by cumulative offenses, for each of which imprisonment may be lawfully imposed for a short time, the period prescribed by the sentence was reached, the punishment was greatly beyond anything required by any humane law for the offenses. The state may, indeed, make the drinking of one drop of liquor an offense to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass, and make thereby a thousand offenses, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration.

Id. at 340.[4]

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3. O'Neil was found guilty of 307 offenses of illegally selling liquor and sentenced to pay a combined fine of $6,638.72, and if not paid, to serve three days for each dollar owed, for a total of 19,914 days (54 years) in jail. 144 U.S at 330-31.

4. *See also*, Justice Berch's dissent below, noting that child pornography crimes are typically committed by possessing multiple images: "Unlike other crimes, which tend to occur in relative isolation, those who possess pornography tend to possess more than one image." Pet. App. 39a.

The legal question raised by the Petition is an important one that requires this Court's resolution. The Court's Eighth Amendment opinions have never expressly considered how the Amendment is to be applied when mandatory minimum sentences are required to be served consecutively, and lower court decisions are in substantial disarray.[5] Review at this time is especially appropriate in view of the sharply increasing use by Congress and the State legislatures of mandatory minimum sentences, coupled with consecutive sentence requirements. *See* Justin Brooks, *Prisons and Corrections: The Politics of Prisons*, 77 Mich. B.J. 154, 155 (Feb. 1998).

The purpose of the Eighth Amendment is to prohibit greatly disproportionate punishments from being inflicted. That purpose can be satisfied only if the *Harmelin* threshold inquiry into gross disproportionality, is addressed to the punishments that legislatures require to be inflicted, and that are actually inflicted. If that inquiry were made in this case, there is no question that a substantial Eighth Amendment issue would be presented. That issue should be resolved.

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5. Compare, e.g., the opinion below with *State v. Ballard*, 699 A.2d 14 (R.I. 1997), ("Where a criminal defendant commits multiple criminal endeavors concurrently, thereby giving rise to multiple convictions, that defendant generally ought to be committed to serve sentences for those convictions concurrently, absent the presence of extraordinary aggravating circumstances."; *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004)), ("In this case, although the length of time to be served by Turns, as required by 18 U.S.C. § 924(c), is severe, it would appear to serve the twin goals of retribution and deterrence, without being grossly disproportionate to the several *offenses* committed." (emphasis added)).

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To The Arizona Supreme Court

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ARIZONA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to defending and preserving the individual rights and liberties guaranteed by the Constitution and the laws of the United States. The Arizona Civil Liberties Union Foundation of Arizona (ACLU-AZ) is one of the ACLU's statewide affiliates. Since its founding in 1959, the ACLU-AZ has appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU-AZ has participated in cases involving the proper interpretations of the scope and meaning of the Eighth Amendment's prohibition against cruel and unusual punishment. Because this case raises important Eighth Amendment questions, its proper resolution is a matter of great concern to the ACLU, its affiliates and its members.

ARGUMENT

The Arizona Supreme Court concluded that it was required by this Court's precedents to analyze Berger's two-hundred-year sentence as if it were a ten-year sentence. In ACLU-AZ's view, the petition for certiorari is correct in asserting that the Arizona Supreme Court misinterpreted this Court's prior decisions, including *Lockyer v. Andrade*, 538 U.S. 63 (2003). If ACLU-AZ is

[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for the *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, its members or its counsel made a monetary contribution to this brief.

correct in that regard, there is obviously potential for confusion in the case law. This Court should dispel that confusion.

If ACLU-AZ is wrong, and this Court's prior decisions do require that Eighth Amendment analysis be a stylized exercise with little regard for reality, the rules established by those decisions should be reconsidered.

CONCLUSION

For the reasons stated herein, the American Civil Liberties Union Foundation of Arizona urges this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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